A- 20-226 Judge Davis
March 18
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~447.~~ 229-

JOHN D. NASH, JOHN VAN HAGEN, AND OSCAR NASH,
PLAINTIFFS IN ERROR,

vs.

H. H. WILLIAMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED NOVEMBER 2, 1872.

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1 United States circuit court, 5th circuit, for the western district of Texas, at Austin sitting.

JOHN D. NASH, OSCAR NASH, JOHN VAN HAGAN, pl'ffs in error,
vs.
HENRY H. WILLIAMS, DEF'T IN ERROR. } No. 1054.

On writ of error to Supreme Court of the United States.

Be it remembered that, at a term of the circuit court of the United States, 5th circuit, in and for the western district of Texas, for the June term, A. D. 1872, of said court, to wit, on the first Monday of June, A. D. 1872, Hon. Jos. P. Bradley, associate justice of the Supreme Court of the United States, presiding as circuit court judge, among other, the following proceedings were had:

2 The plaintiff, Henry H. Williams, of Baltimore, M'd, brings this suit, with the following petition, endorsed as follows, viz: "Henry H. Williams vs. Jno. D. Nash et als. No. 1054. Filed April 29th, 1868. M. Hopkins, clerk. Process issued Apr. 30th, 1868. This action is brought as well to try title as for damages. Chandler, Turner & Carleton, att'ys for plaintiffs." And is in words to wit:

Petition.

United States circuit court for the western district of Texas, sitting at Austin. June term, 1868.

Your petitioner, Henry H. Williams, a resident citizen of the city of Baltimore, in the State of Maryland, brings this suit against Jno. D. Nash, Oscar Nash, Jno. Van Hagen, J. A. Hooper, and Jno. Armstrong, resident citizens of the county of Bastrop, in the western district of the State of Texas.

And, for cause of action, petitioner alleges that he was, on the first day of January, 1868, and a long time before that date, and still
3 is, the legal owner of all that certain league of land in the aforesaid county of Bastrop, situated upon the east bank of the Colorado River about seven miles above the town of Bastrop, known as league No. 4, granted to S. M. Williams.

And your petitioner being so possessed of said lands, said defendants afterwards, to wit, on the first day of January, 1868, with force and arms, broke the close of your petitioner, and entered upon and took forcible possession of said land, and from thence hitherto they have held possession of said league of land and all the appurtenances thereon, consisting of fields, houses, mills, store-houses, cotton-gin, still-house, stables, cabins, and other improvements upon said property situated; and they have, with force and violence, cut and destroyed and carried a large amount of timber off from *from* said land, and converted the same to their own use, of great value, to wit, of the value of twenty thousand dollars.

4 And petitioner further alleges that each and all of said defendants, from the first day of January, 1868, to the present time, have cut down, consumed, destroyed, and converted to their own use, wood and timber to the value of two hundred dollars per day, each and every day since the said first day of January, 1868, for all which,

each and all the defendants are jointly and severally liable and bound to pay your petitioner said damages, all of which has long since been due and payable.

And petitioner further alleges that each and all the defendants have committed other wrongs and injuries to said premises, to the great damage of your petitioner twenty thousand dollars.

And y'r petitioner further alleges that the defendants still hold forcible possession of said land, and refuse to surrender the possession thereof to petitioner, although often demanded of them.

The premises considered, petitioner prays that the defendants
5 be cited to be and appear at the next term of the circuit court of the United States, at Austin, on the first Monday in June, 1868, then and there to answer this petitioner, and for judgement for the damages herein sued for, and of suit & for writ of possession.

CHANDLER, TURNER & CARLETON,
Att'ys for Plaintiff.

And afterwards, to wit, on the 24th June, 1868, was filed the following demurrer, & etc., which is endorsed, to wit: "No. 1054. H. H. Williams vs. J. D. Nash et als. Demurrer and ans. of O. Nash, J. D. Nash, and J. Van Hagen. Filed June 24th, 1868. M. Hopkins, clerk. And which is in words to wit:

Demurrer & answer.

In U. S. circuit court, June term.

H. H. WILLIAMS
vs.
JOHN D. NASH ET AL.

And now, at this day, come the def'ts John D. Nash, Oscar Nash,
6 and Jno. Van Hagen, and say that the matters and things in said plaintiff' petition alleged are not sufficient in law for them to have and maintain their suit; and of this they pray judgement, &c.

And for answer the said defendants, J. D. Nash, Oscar Nash, and J. Van Hagen, say that they are not guilty in manner and form, as the plaintiff has alleged, of the wrongs, injuries, and damage in the plaintiff's petition; and they put themselves upon the country.

PASCHAL, HANCOCK, AND WEST,
Def'ts' Att'ys.

And afterwards, to wit, on the 25th June, 1868 came the defendants, and filed their plea of limitation, which is endorsed as follows: "H. H. Williams vs. J. D. Nash et als. Def'ts plea of limitation. Filed June 25th, 1868. M. Hopkins, clerk." And is in words to wit:

Plea of limitation.

H. H. WILLIAMS
vs.
J. D. NASH ET ALS. } No. 1054. June term, 1868.

And now comes the defendants J. D. Nash, Jno. Van Hagen,
7 & O. Nash, and, with leave of the court first had and obtained,

and amended their original heretofore filed, and by way of amendment they aver:

That they, and those under whom they claim, have had peaceable, advers', notor'ous, uninterrupted, and continuous use, enjoyment, actual possession, control, and cultivation of the land in the plaintiff's petition described, for three years and more before the plaintiff's cause of action accrued, and before the institution of this suit under title, the same being a regular consecutive chain of transfer from and under the sovereignty of the soil down to these defendants; and that they still hold as hitherto under said title adversely to the plaintiffs; and this they are ready to verify.

That they, and those under whom they claim, now hold and have heretofore held the land in suit adversely to the plaintiffs, and say that they now hold and have hitherto held the land adversely to the plaintiffs for three years and more before this suit was brought, having
8 peaceable, continuous, adverse, notorious, and *and* actual possession of the land in suit under color of title, being, in fact, by consecutive chain acquired in good faith & honestly from the sovereignty of the soil down to these defendants, and during all which time they have notoriously and continuously held possession of said land adversely to the plaintiffs; and this they are ready to verify.

PASCHAL, HANCOCK & WEST,
Def'ts' Att'ys.

And for further plea they say that they and those under whom they claim have had five years peaceable, notorious, continuous, and adverse possession of the land in suit for five years before this suit was brought, under deeds duly recorded, using, enjoying, cultivating, and paying taxes on said land; all of which they are ready to verify, & etc.

PASCHAL, HANCOCK AND WEST,
Def't's Att'ys.

The following entry appears on the minutes of the court:

Continuance.

THURSDAY, *June* 25, 1868.

HENRY H. WILLIAMS
vs.
JOHN D. NASH ET AL.

On this day come the parties, by their att'ys—the pl'ffs by Chandler & Carleton, and the defendants by Hancock & West & Paschal—and, on motion, the case was contin'd on affidavit of the def'ts.

9 The disclaimer of J. A. Hooper is endorsed in words to wit: "H. H. Williams vs. J. D. Nash et als. 1054. Disclaimer of J. A. Hooper. Filed June 24, 1868. M. Hopkins, cl'k." And is in words to wit:

Disclaimers of J. A. Hooper and John Armstrong.

H. H. WILLIAMS
vs. } 1054.
J. D. NASH ET AL.

And now comes the def't J. A. Hooper and says that he has never trespassed on the land in suit, or resided on same, and he disclaims all

interest in the matter in suit, & asks that, as to him, he may have his costs & the suit dismissed.

HANCOCK & WEST,
Atty's Pl'ff.

Disclaimer of John Armstrong endorsed in words to wit: "H. H. Williams vs. J. D. Nash et al. No. 1054. Disclaimer of John Armstrong. Filed June 24, 1868. M. Hopkins, cl'k." And in words to wit:

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } No. 1054.

And now comes the def't John Armstrong & disclaims all interest in the land in suit, & says that he is in possession of said land temporarily, without having or setting up any title to the same, & that such possession is with the consent of both parties, pl'ffs & def'ts, and is not hostile to either. He therefore asks for his costs, & that the suit may be dismissed as to him.

HANCOCK AND WEST,
Att'ys for Armstrong.

And, afterwards, the following motion was filed, endorsed in words to wit: "H. H. Williams vs. J. D. Nash et als. 1054. Motion to withdraw demurrer, ans., & pleas, & for leave to plead in abatement. Filed Jan'y 19, 1869. M. Hopkins, cl'k." And in words to wit:

Motion to withdraw demurrer, ans., &c.

In the U. S. C. C., at Austin, Texas, Jan'y term, 1869.

H. H. WILLIAMS, PL'FF.,
vs.
J. D. NASH ET ALS. } No. 1054.

And now, at this day, comes the def'ts J. D. Nash, John Van Hagan, & O. Nash, in the above-entitled cause, and would respectfully represent and show to the court that it is to the interest of justice, & will prejudice no legal right, that the above-named pl'ff may have, for leave to be granted to the said def'ts above named to withdraw their pleadings heretofore filed in said cause, on 24th June, 1868, & on 25th June, 1868, & to allow the said def'ts to file a plea in abatement, showing that the said suit now pending was instituted contrary to and in violation of law. They therefore move the court for leave to withdraw their former answers, demurrers, and pleas above referred to, and have special leave granted to them, in the discretion of the court, to plead in abatement to the said plaintiff's cause of action.

HANCOCK & WEST,
Def'ts' Att'ys.

The defendants' plea in abatement, tendered to the court with the foregoing motion, is in words to wit:

Defendants' plea in abatement.

In U. S. circuit court, law side, Austin, Tex., Jan'y term, 1869.

HENRY H. WILLIAMS, PL'FF,
vs.
J. D. NASH, OSCAR NASH, JOHN VAN HAGAN, John Armstrong, and J. A. Hooper, def'ts. } No. 1054.

And now, at this day, come the said above-named def'ts, John D. Nash, John Van Hagan, & Oscar Nash, in their own proper persons and by their att'ys; also, in the above-entitled and numbered cause, and defend the wrong & injury when, &c., &c.; and the said above-named defendants say that, before and at the time of the filing of the said above-entitled suit, No. 1054, which filing was on the 29th day of April, 1868, they were in possession, lawfully and peac'ably, of
12 the league of land described in the said pl'ff's petition, and were not liable to a suit by or on behalf of the said pl'ff H. H. Williams, for they say that before, at, & after the date of the filing of his said suit the following facts existed, to wit:

That, on the 7th day of December, A. D. 1867, one S. S. Cornett, representing himself to be the legal owner of the said league of land in the said plaintiff's petition set forth and described, filed in the United States circuit court for the western district of Texas, sitting at Austin, Texas, (being, in fact, the same court in which this present suit, now pending, was and is instituted,) a suit for trespass, & to try the title to said league of land, and for the recovery of the possession of the same, and for damages, in which said suit, styled on the docket of the law side of said circuit court No. 1026, John H. Williams and his wife Anna, and William H. Williams and his wife Eddie, were def'ts, in which said suit having, in all respects, complied with the requirements of the statutes in such cases made and provided, the said plaintiff, S. S. Cornett, prayed for the issuance of a writ of sequestration for the purpose of preventing the further trespass of the said J. H. &
13 Anna Williams, and the said W. H. and Eddie Williams, on the *the* said league of land, being the same land described & sued for by the said H. H. Williams, in this present suit now pending; and these def'ts would furthur show that, in accordance with the prayer of the said Cornett in his said suit above-described, being suit No. 1026, on the 10th day of Dec'r, A. D. 1867, a lawful writ of sequestration was duly and regularly issued out from said United States circuit court, commanding the United States marshal for the said western district of Texas, in due form of law and in accordance with the statutes of the State of Texas to that effect, to take possession of the said league of land above referred to and in plaintiff's petition described, and to keep said league of land subject to the order of said circuit court, unless the said defendants, within thirty days, for his levy, shall or should replevy the same—which said writ of sequestration duly came into the hands of the said United States marshal for the said western district of Texas on the 12th day of December, A. D. 1867, and was duly & legally and peaceably executed by the said marshal, on the 16 day of December, A. D. 1867, by taking the lawful possession of the
14 said league of land, in his official capacity as United States marshal, by virtue of said writ of sequestration, and so holding

the same until the 19 of Feb'y, 1868. Def'ts furthur say that, on the 8th day of January, 1868, the defendants, J. H. Williams and W. H. Williams, waived in said suit No. 1026, in writing, their right, under the law, to replevy the said land, and, on the same day, 18th Jan'y, 1868, the said H. W. Williams, the plaintiff herein, through his attorneys, Chandler & Carleton, also, in writing, waived his right as landlord for the said defendants, J. H. & W. H. Williams, to replevy the said land, and thereupon, to the said pl'ff in said suit No. 1026, with the tacit consent of said H. W. Williams, the said S. S. Cornett, he having, in accordance with law, replevied said league of land by giving bond, on the 19th day of Feb'y, A. D. 1868, the said United States marshal, in accordance with law, peaceably delivered the lawful possession of said league of land by putting it into the custody of the said plaintiff, S. S. Cornett, acting through his att'ys of record, Hancock & West, to be held by the said Cornett, subject to the control & under the orders of the said circuit court, until the final decision
15 of the said suit, No. 1026, in which said suit the said writ of sequestration had been sued out by the said S. S. Cornett.

And the said def'ts furthur say that, acting under the authority and by the direction of the said Cornett, through his att'ys of record, Messrs. Hancock & West, the said def'ts John D. Nash, John Van Hagan, and Oscar Nash, received peaceably and lawfully from the said United States marshal, under the authority and on behalf of the said S. S. Cornett, on the 19th day of February, A. D. 1868, the lawful possession of said league, and they aver that they entered peaceably into such possession, under such authority, for the said S. S. Cornett, through & by virtue of said writ of sequestration, and in no other capacity and in no other manner than as aforesaid, and that the said def'ts so held the lawful possession of the said league of land temporarily, and awaiting the further orders of the court in said case, No. 1026, and ready to abide the same and to obey the same in every respect; and defendants furthur say that they were so under the said authority, and, by virtue of said writ of sequestration, in the quiet possession of the said league of land, on the 29th day of April, 1868, at which date this said suit was instituted; and they further say that, at the date of the
16 service of process in this suit on them, they had possession of said league of land, as above set forth, and in no other manner, and in order the more fully to set forth the matters herein contained, the def'ts refer to all the papers and records, writs, bonds, and other papers on file in said case, No. 1026; and they furthur say that, by reason of the said facts above set forth, that the said league of land, before and on the said 29th day of April, 1868, was in the custody of the law to abide the final verdict of the said suit, No. 1026, and that these def'ts, for the plaintiff, and by virtue of his right under the replevy bond executed by him is here set forth, held possession of said land, not as private individuals, but under the legal processes of the court and as agents of the law, and all this the said def'ts stand ready to verify; wherefore they pray judgment, if the said court can or ought further to take cognizance of the said pl'ff's' petition; and they pray that the said suit may abate.

JOHN D. NASH,
JOHN VAN HAGAN,
OSCAR NASH, *Def'ts*,
By their att'ys, HANCOCK & WEST.

17 Personally appeared before the undersigned authority, John D. Nash, for himself and as representing the said def'ts John Van Hagan & Oscar Nash, and, being by me duly sworn, on oath says that the matters and things in the above plea set forth are true, to the best of his knowledge and belief.

(Signed) JOHN D. NASH.

In witness whereof I have hereunto set my hand, this 19th day of Jan'y, A. D. 1869.

M. HOPKINS,
Clk U. S. C. Court, at Austin, Texas.

And afterwards, the opinion of the court, in words, to wit:

Opinion of the court on plea in abatement.—Filed Feb'y 26, 1869.

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } No. 1054.

Motion that def'ts J. D. Nash, John Van Hagan, and O. Nash, have leave to withdraw their pleadings heretofore filed, and to plead in abatement.

I am of the opinion that the matter set up in the plea proposed to be pleaded in abatement, would be more proper in a plea in bar. Indeed, I doubt whether it could be properly pleaded in abatement. For this reason I shall refuse the motion and give leave to both pl'ff and def'ts to amend or plead further.

T. H. DUVAL, *U. S. Judge.*

FEB'Y 26, 1869.

And afterwards the following entry appears upon the minutes of court:

Order overruling motion to withdraw, &c.

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } No. 1054. (Feb'y 26, 1869.)

Motion that def'ts, J. D. Nash and others, have leave to withdraw their plea heretofore filed, and plead in abatement.

Upon consideration of the motion of def'ts, the court is of the opinion that it ought not to be granted. The motion is, therefore, refused, and leave, to both pl'ff and def'ts, to amend or plead further.

And afterwards, June 9, 1869, the following entry appears upon the minutes of court:

18 *Continuance.*

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } No. 1054.

By consent and agreement of parties it is ordered that these causes be continued.

And afterwards, Feb'y 10, 1870, the following entry appears upon the minutes of the court:

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } No. 1054.

In this cause came the parties, by their att'ys—pl'ff by Chandler and Carleton, and def'ts by Hancock & West—and, by consent, this cause was ordered continued.

Docket entry.

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } No. 1054.

JUNE 7, 1870.—Leave to pl'ff to file amended petition.

Amended petition is endorsed, to wit: "H. H. Williams vs. J. D. Nash et al. Amended petition filed June 7, 1870. M. Hopkins, cl'k." And is in words, to wit:

Amended petition.

In the cir't c't of the United States for the west. dist. of Texas, at Austin.

H. H. WILLIAMS
vs.
J. D. NASH ET OSCAR NASH, JOHN VAN HAGAN, & John Armstrong. } 1054.

To the judges of the circuit court of the United States for the west. district of Texas, holding sessions at Austin:

And now comes the pl'ff, by his att'ys, leave of the court having first been obtained, and amends his original petition in the above-
19 stated cause, and, for amendment, alleges that the defendants John D. Nash, John Van Hagan, and Oscar Nash, who were and are the only solvent and responsible defendents in this cause, on the 1st day of January, 1868, and each and every day and each and every hour in each day from the date last aforesaid to the present time, has cut down, destroyed, and carried away from the league of land described in plaintiff's original petition, and caused to be cut down, destroyed, carried away, and converted to their own use, wood, timber, lumber, shingles, and rails of the instrinsic value of fifty thousand dollars; all of which wrongs, injuries, and trespasses as aforesaid, were done and committed by the said defendants, with force and arms, against the will and consent of your petitioner.

And your petitioner further *further* alleges that the defendants done and committed each and all the aforesaid trespasses, injuries, and damages as aforesaid, without even setting up any shadow of claim or title to said league of land, or the timber thereon.

And your petitioner further alleges that said defendants, and each of them, in the cutting down, destroying, and carrying away from said

league of land the timber that was standing and growing thereon, cut it in a wasteful and destructive manner, by not working up all logs
20 from the trees they cut into saw-logs and shingles, as they should have done to make the trees and timber yield the best profit; that they did not clear the land, or pile brush on said land as they cut the timber, as it should have been done, to make said timber and property yield a fair profit; all of which was wilfully and maliciously done by said defendants, whereby your petitioner has been damaged the further sum of ten thousand dollars.

And your petitioner further alleges that each and all the aforesaid wrongs, injuries, and trespasses committed by each and all of the defendants upon the said league of land, was wantonly, wilfully, and maliciously committed by them, with a full knowledge of your petitioner's legal right and title to said land and the timber thereon, and to the possession thereof; by reason whereof petitioner alleges that said defendants, and each of them, in addition to the actual damages hereinbefore alleged against them, are justly and legally liable and bound to pay petitioner the further sum of ten thousand dollars, as vindictive or exemplary damages and smart money.

And petitioner further alleges that the league of land sued for in this action, and for the damages committed thereon, is more definitely
21 described as follows, to wit: One league of land, which is situated on the left bank of the Colorado River, above the road which leads from Bexar to Nacogdoches, and, according to the map numbered 4, adjoining and below a tract of land surveyed for Wilbarger, beginning the survey from a stake which serves as a land-mark for the upper corner of league number 3, from which, at 10 varas south, there is an elm marked 3, and from which, at 10 varas north, there is a cedar marked 4; a line was run north 45 degrees east, seven thousand and eighty varas to a stake for corner, from which, at eight (8) varas north 32° west, there is a forked cedar marked +, and 12 varas south 9° east, there is a post-oak marked +; from this point a line was run north 45 degrees west, four thousand six hundred and seventy varas to a stake, from which, at 2 varas north 30° west, there is a post-oak marked +, and four varas south 34° west there is another post-oak marked +; from this point a line was run south 30° west seven thousand six hundred varas to the said river, at the lower corner of the said land of Wilbarger, which is a stake on the bank of the river, from which, at 6 varas north 51° west, there is a hackberry marked 5; and at 10 varas north 68° east,
22 there is an elm marked 4; and from this point followed the river downward to the place of beginning, and comprehends one league of land.

And your petitioner further alleges that the defendants are justly indebted, liable, and bound to pay your petitioner each and all the aforesaid sums of money alleged against them for the joint and several trespasses, wrongs, and injuries, and damages herein charged against them, and that each and all of said several sums of money have long since been due and payable; that the defendants, nor either of them, have ever paid the same, or any part thereof, although often demanded of them. Wherefore petitioner prays for judgment for said several sums of money herein sued for, and for costs, and for writ of possession, and for general and special relief, &c., &c.

CHANDLER, TURNER & CARLTON,
Att'ys for Petitioner.

And plaintiff's replication to defendants' plea of limitation endorsed in

words to wit: "Henry H. Williams vs. Jno. D. Nash et als. Plaintiff's replication to defendants' plea of limitation. Filed June 7, 1870.
23 M. Hopkins, cl'k." And is in words to wit:

Plaintiff's replication to def't's plea of limitation.

In the circuit court of the United States for the west'rn distr. of Texas, at Austin sitting.

H. H. WILLIAMS
vs.
JOHN D. NASH ET AL. } No. 1054.

And now comes the plaintiff, by his attorneys, and, for replication and plea in avoidance of the defendants' pleas of the statutes of limitations of three years and five years, filed by said defendants on the 25th day of Jan'y, 1868, plaintiff says said defendants have acquired no right, title, or claim, by virtue of the force or effect of any statute of limitations, to the land sued for in this action, because he says that, in 1858, the date of the death of Samuel M. Williams, the grantee of the league of land sued for in this action was, by his tenants, in the actual possession thereof, and that his administrator, by his tenant, had and held actual possession thereof from the date of his death until the latter part of the year 1862, or the fore part of the year 1863, and because plaintiff alleges that, on or about the 26th day of Feb'y, 1863, the legislature of the State of Texas passed a law, one section of which reads as follows:

SECTION 1. All statutes of limitation on all civil rights of action
24 of every kind, whether real or personal, are hereby suspended until one year after the close of the war between the Confederate States and United States; provided that the limitation upon all rights of action for injuries done to the person of another, as of assault and battery, wounding, or imprisonment, and for injuries done the character or reputation of another, as of libel or slander, shall not be suspended by the provisions of this act, which said act was legally approved by the governor, and became the law of the State; and plaintiff avers that the war referred to in said act did not close until the day of , 1866.

By reason whereof plaintiff avers that the legal representatives of the said Samuel M. Williams were inhibited by law from bringing suit against any one in possession of land and holding the same adverse to said estate of Samuel M. Williams, dec'd, until after the date last aforesaid, if, in truth, the same was or had been held by the defendants, or those under whom they claim, which is not admitted, but expressly denied.

And your petitioner further states that, in the year 1866, the people of Texas, in convention assembled, passed an ordinance, one section of which reads as follows:

25 SEC. 6. *Be it further ordained*, That, in all civil actions, the time between the 2nd day of M'ch, 1861, and the 2nd day of Sept., 1867, shall not be computed in the application of any statute of limitations.

By reason whereof this plaintiff says that no limitation run or can be legally plead by the defendants in bar of any right of action between the said second day of M'ch, 1861, and the 2nd day of Sept., 1866, and that they, the defendants, are barred and precluded by the foregoing provision of said constitution from the benefit of said pleas between said two last-named dates.

And plaintiff further states that, on or about the day of , 1870, the Congress of the United States passed, and the President of United States signed, an act accepting and receiving the constitution of the State of Texas, adopted by the people of Texas in convention on or *or* about the day of , 1869, and ratified by the people of Texas at an election held on the 30th day of November and 1st, 2nd, & 3rd days of December, 1869, which last-named constitution contains the following provision:

26 SECTION XLIII. The statutes of limitation of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State until the acceptance of this constitution by the United States Congress.

By reason of the force and effect of the foregoing provision of said constitution and the law of the Congress of the United States accepting the same, plaintiff alleges that said defendants are estopped, barred, and precluded from the benefit of any statute of limitation of either three or five years between the 28th day of January, 1861, and the day of , 1870, the last-named day being the date when the said last constitution was accepted by the Congress of the United States and by the President of the United States as aforesaid.

And plaintiff further alleges that, from and after the 28th day of January, 1861, a public war existed between the United States of America and the so-called Confederate States, which of itself operated as an interruption of the statutes of limitations, and no limitation run from that time until the political authority of the United States fixed and

27 determined the time at which they should again commence to run; that the said United States of America, as the conquering power over the so-called Confederate States, of which the State of Texas composed a part, permitted the people of the said State of Texas to fix the time at which the statute of limitations should begin to run; that, by the action of the people of the said State of Texas, in convention assembled, in the year 1869, it was provided that no limitation should run between the 28th day of January, A. D. 1861, and the date of the acceptance of the constitution so formed by the people of Texas, which acceptance of the said constitution was had and made by the Congress of the United States on the day of , A. D. 1870.

And plaintiff further alleges that he was, at and before the said 28th day of Jan'y, 1861, and has all the time since that date and the present time, continued to be a resident citizen of the State of Maryland, one of the United States of America.

And plaintiff further alleges that, by the act of June 11th, 1864, passed by the Congress of the United States, it was provided as follows:

28 "That, wherever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person, who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action, or the arrest of such person, or whenever, after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance of the laws or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

That, by virtue of the ordinance of the constitution of 1869, as above set forth, the time is and was fixed during which persons residing within

the so-called Confederate States and the United States of America were beyond the reach of legal process. All of which the said plaintiff is ready to verify, wherefore he prays judgment, &c.

CHANDLER, TURNER & CARLTON,
Att'ys for Plaintiff.

Docket entry.

H. H. WILLIAMS
vs.
JNO. D. NASH ET AL. } No. 1054.

JANUARY 8TH, 1871.—Continued as on affidavit of defendants.

29 And afterwards the following entry appears upon the minutes of the court:

Entries minutes.

HENRY H. WILLIAMS
vs.
JNO. D. NASH ET AL. } No. 1054.

TUESDAY, *June 4th*, 1872.

On this day came the parties—the plaintiffs by Chandler, Hamilton, Carleton, and Robertson, and the defendants by C. S. West and Geo. F. Moore—and the def'ts' demurrer to the plaintiff's petition having been overruled by the court—

Now came a jury of twelve good and lawful men of the western district of Texas, duly tried, empanneled, and sworn, to wit: W. T. Haller, W. E. Jenkins, Geo. P. Smith, Jno. N. Kenly, A. Lindenthal, John Burgeois, James R. Davis, R. M. Pareida, Alex. McGrew, Geo. Rochau, B. G. Prokope, J. B. Walker, and, by consent of the presiding judge, Hon. Tho's H. Duval withdrew from the bench in this case, and the cause proceeded on the pleadings until the hour of adjournment.

WEDNESDAY MORNING, *June 5th*, 1872.

And now, on this day, came the parties, by their attorneys—the
30 plaintiffs by Chandler, Hamilton, Carleton, and Robertson, and the defendants by C. S. West and Geo. F. Moore—and came also the jury empanneled in the cause, and thereupon the cause proceeded until the hour of adjournment.

Entries minutes.

THURSDAY, *June 6th*, 1872.

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } 1054.

And now came the parties, by their att'ys, and came also the jury empanneled in the cause; and, the evidence having closed, the plaintiff opened the argument, and the time having been limited to both parties, the plaintiff continued until the hour of adjournment.

Entries minutes.

FRIDAY, *June 7th*, 1862.

H. H. WILLIAMS
vs.
J. D. NASH ET AL. } 1054.

And now came the parties, by their att'ys, and the jury empanneled in the cause; and, the arguments having closed, the court charged the jury, and by court it was ordered that they return their verdict sealed to the clerk.

Entry minutes.

SATURDAY, *June 8th*, 1872.

H. H. WILLIAMS
vs.
J. D. NASH ET ALS. } 1054.

31 The jury, under the direction of the court, having returned their verdict rendered in this cause to the clerk in a sealed envelope, by order of the court the jury was called, and the court directed the clerk to read the verdict, and the same, on suggestion of counsel, having been amended by consent of the att'ys for def'ts, court and jury, was, as amended, filed, and is in words, to wit:

We, the jury, find for the plaintiff the land described in plaintiff's petition, and assess the damages at five thousand dollars.

GEO. P. SMITH, *Foreman.*

And the judgement of the court is now entered in words, to wit:

Judgment of the court.

HENRY H. WILLIAMS
vs.
JNO. D. NASH ET ALS. } 1054.

And now on this day came on to be heard the above numbered and styled cause, whereupon the plaintiff appeared by his attorneys, Chandler, Carleton, Robertson, and A. J. Hamilton, and the defendant, Jno. D. Nash, Oscar Nash, and Jno. Van Hagen, by their attorneys,
32 Hancock and West, and George F. Moore, and the plaintiff dismissed the cause as against the defendants Jno. Armstrong and J. A. Hooper, and announced themselves ready for trial. Whereupon came a jury of twelve good and lawful men of the western district of Texas, to wit: George P. Smith, and eleven others, who, after being duly tried, empanelled, and sworn, and after hearing the evidence, argument of counsel, and the charge of the court, retired to consider their verdict, returned unto court the following verdict, to wit: "We, the jury, find for the plaintiff the land described in plaintiff's petition, and assess the damages at five thousand dollars.

"GEO. P. SMITH, *Foreman.*"

It is therefore ordered and adjudged by the court that the plaintiff, Henry H. Williams, do have and recover of and from the defendants, Jno. D. Nash, Oscar Nash, and Jno. Van Hagen, and all those claiming

under them since April 29th, 1868, all that certain league of land and the possession situated in the county of Bastrop on the east
33 bank of the Colorado River, above the road which leads from Bexar to Nacogdoches, and numbered 4; being the same league originally granted to Samuel M. Williams by the government of Mexico, and which is described by metes and bounds as follows: adjoining and below a tract of land surveyed for Wilbarger, beginning the survey from a stake which serves as a landmark for the upper corner of league number 3, from which, at 10 varas south, there is an elm marked 3, and from which, at 10 varas north, there is a cedar marked 4; a line was run north 45° east, seven thousand and eighty varas to a stake for corner, from which, at 8 varas north 32° west, there is a forked cedar marked +, and 12 varas south 9° east, there is a post-oak marked +; and from this point a line was run north 45° west, four thousand six hundred and seventy varas to a stake, from which, at 2 varas north 30° west, there is a post-oak marked +, and four varas south 34
34 west, there is another post-oak marked +; from this point a line was run south 30° west, seven thousand six hundred varas to the said river, at the lower corner of the said land of Willbarger, which is a stake on the bank of the river, from which, at 6 varas north 51° west, there a hackberry marked 5; and at ten varas north 68 east, there is an elm marked 4; and from this point followed the river downward to the place of beginning, and comprehends one league of land; and that writ of possession do issue against the said defendants Jno. D. Nash, Oscar Nash, and Jno. Van Hagen, and all others claiming by, through, or under them for the above-described league of land since the 29th day of April, 1868.

It is further ordered and adjudged that the plaintiff, Henry H. Williams, do have and recover of and from the defendants Jno. D. Nash, Oscar Nash, and Jno. Van Hagen, the sum of five thousand dol-
35 lars, together with interest from this date at the rate of eight per cent. per annum, and for which execution may issue as required by law. It is further ordered and adjudged that the plaintiff, Henry H. Williams, do have and recover of and from the defendants Jno. D. Nash, Oscar Nash, & Jno. Van Hagen, all the costs in this behalf expended, except such as have been incurred for and on behalf of the defendants Jno. Armstrong & J. A. Hooper.

It is further ordered and adjudged that the defendants Jno. Armstrong and J. A. Hooper do have and recover of and from the plaintiff, Henry H. Williams, all costs by them in this behalf expended, and for which execution may issue. It is further ordered that the officers of court have their execution against each party respectively for the costs by either party pl'tff or def't incurred.

36 The following instructions asked for by the defendants, filed June 7, 1872, and in words, to wit:

Instructions asked by defendants.

In U. S. circuit court, western district of Texas, law side, June term, 1872, sitting at Austin.

H. H. WILLIAMS *vs.* J. D. NASH ET ALS. } No. 1054. Instructions asked by the defendants.

I. On the death of S. M. Williams, the legal title to the land in suit vested in the heirs of said Williams.

HANCOCK & WEST,
Att'ys for Defendants.

Allowed.

In U. S. circuit court for the western district of Texas, law side, June term, 1872, at Austin.

H. H. WILLIAMS *vs.* J. D. NASH ET ALS. } No. 1054. Instructions asked by defendants.

II. The defendants' chain of title in evidence before you, vests the fee in S. S. Cornett to the land in suit.

HANCOCK & WEST,
Att'ys for the Defendants.

Allowed.

37 In the U. S. circuit court for the western district of Texas, law side, June term, 1872, at Austin.

H. H. WILLIAMS *vs.* J. D. NASH ET ALS. } Instructions asked by the defendants.

III. The heirs of S. M. Williams took this legal title charged with the debts of the estate, and, if you believe that land in suit was sold fairly and in good faith to pay a bona-fide debt which has been allowed and approved against the estate of S. M. Williams, and that the order of sale was obtained without any fraud on the part of the plaintiff or of his agents, (for the acts of his agents, done by his consent, or ratified by him when known, are his acts,) then such sale passed the title to the plaintiff.

Modified.

But if you believe that the order of sale was obtained by a fraudulent collusion between the heirs of Williams, and S. H. Williams, agent for the plaintiff, and that the debt was never allowed or approved against the estate, then you will find for the defendants.

HANCOCK & WEST,
Attorneys for the Def'ts.

"Modified according to the charge delivered."

38 In U. S. circuit court for the western district of Texas, law side, June term, 1872, at Austin.

H. H. WILLIAMS *vs.* J. D. NASH ET ALS. } No. 1054. Instructions asked by defendants.

IV. If, however, the jury believe from the evidence that the plaintiff, H. H. Williams, had actual notice of the sequestration suit of Cornett vs. S. H. Williams & W. H. Williams, and employed counsel, and had opportunity to appear and defend and failed to do so, then the judgment in that cause is as binding on him as if he had been a party to the record.

HANCOCK & WEST,
Att'ys for the Defendants.

Disallowed and explained, as appears by the charge delivered.

In the U. S. circuit court for the western district of Texas, law side, June term, 1872.

H. H. WILLIAMS
vs.
J. D. NASH ET ALS. } No. 1054. Instructions asked by the defendants.

V. If the jury believe that, at the time the plaintiff alleges the trespass to have occurred, and at the time the suit was filed, the land was in the custody of the law, and that the defendants entered under the
39 authority of the court and were then holding subject to the judgment of the court, when this suit was brought, then you will find for the defendants.

HANCOCK & WEST,
Attorneys for the Def'ts.

"Disallowed because the facts do not authorize such a charge. Connett had replevied the lands in Feb'y. This suit was not brought 'till the 29th of April, 1868"

In U. S. circuit court for the western district of Texas, at Austin, law side, June term, 1872.

H. H. WILLIAMS
vs.
JOHN D. NASH ET ALS. } No. 1054. Instructions asked by the defendants.

VI. The plaintiff, in support of the issue on his part, and to show title for the land sued for, has offered in evidence a deed of the administrator of the estate of Sam'l L. Williams, executed by virtue and under an order of sale of the probate court of Galveston County. If said probate court had not jurisdiction to make said order of sale then said sale is void, and the plaintiff by his purchase acquired no title.
40 The jury are further instructed that said court had no jurisdiction to order said sale, unless the claim of the plaintiff, at whose instance and on whose application it was made, had been presented to, and allowed by the administrator, and approved by the chief justice; and, in determining whether the court had jurisdiction, not only may the record be looked to, but also all the testimony outside of said record, which has gone to the jury, tending to prove the existence or non-existence of a claim of debt allowed and approved as required by law to give it some standing as a valid claim against said estate.

MOORE, HANCOCK & WEST,
Attorneys for Defendants.

Disallowed. The charge covers the ground of this instruction and expressed the views entertained by the court.

41 *Charge of the court.*

HENRY H. WILLIAMS
vs.
JOHN D. NASH ET ALS.

Charge to the jury, by BRADLEY, J.

The plaintiff in this case claims the league of land in question under an administrator's deed from Philip C. Tucker, administrator of Samuel

M. Williams, deceased, dated April 15th, 1866, and a second deed from the same administrator, dated Jan'y 2nd, 1868, under an order of sale made by the probate court of Galveston County, on the 30th of Jan'y, 1866.

The defendants claim as tenants of Squire S. Connett, who claims the land by title derived from the heirs of Samuel M. Williams, dec'd, as follows:

1st. By virtue of trust-deed executed by W'm H. Williams, one of the heirs to J. R. Nichols, June 24, 1861, to secure a debt of $1,800 due to one Prayer, who, afterward, assigned it to one S. S. Connett. In Jan'y 1868, Williams became bankrupt and Connett surrendered the
42 debt and security to the assignee and received from him a deed for the property at a valuation under the 20th section of the bankrupt act.

2nd. By virtue of deeds from Austin M. Williams and his two sisters, the remaining heirs of S. M. Williams, to their brother W. H. Williams, executed in Sept. and Oct., 1862, each for an undivided ¼ part of the tract, and then in Nov'b'r, 1862, a conveyance by W. H. Williams of an undivided ½ of the tract to J. H. Williams his cousin, a son of the plaintiff H. H. Williams. By which deeds the title of the heirs became vested in W. H. Williams and J. H. Williams in equal parts, in Nov'b'r, 1862. On the 1st day of Jan'y 1864, W. H. Williams and J. H. Williams executed a trust-deed to Isaac Wilban, to secure $27,000 due to S. S. Connett, on certain notes given for slaves sold by him to them in Texas, in September previous. In 1867, Connett appointed new trustees to this trust-
deed, under the provisions thereof, and those trustees sold the prop-
43 erty to S. S. Connett to raise the amount due on the notes, and gave him a deed therefor, dated June 18th, 1867.

With regard to the trust deed under which the sale was made, I instruct you, gentlemen, that if you believe that Connett brought the slaves from Missouri, in August or September, 1861, during the war, for the purpose of disposing of the same, being a citizen of Missouri, that it was an unlawful act on his part, contrary to his duty as a citizen of the United States and of Missouri, and his sale of the slaves here was a transaction void in law, and cannot be enforced in the courts; and if the consideration of the trust-deed was illegal and void, the deed itself was void, and no title can be derived under it by Connett, for whose benefit it was executed.

3rd. On the 9th of February, 1867, S. S. Connett recovered a judgement in this court against W. H. & J. H. Williams for $12,584, the amount due on another of said notes, and issued execution thereon;
44 and the marshall sold the tract in question under said execution, and S. S. Connett became the purchaser, on the 18th day of May, 1867, and received a deed of that date from the marshal. This judgement cannot be impeached for any alleged illegality in the consideration.

4th. Having thus obtained the title of W. H. and J. H. Williams to the land, Connett, in December, 1867, brought suit against them and their wives, for recovering possession thereof, and had the land sequestrated; &, on the 19th day of February, 1868, Connett replevied the land, and thus obtained possession thereof. On the 18th of June, 1868, he recovered judgement against the defendants in the action.

It is claimed by the defendants that the plaintiff, Henry H. Williams, is concluded by this sequestration suit, because the defendants were tenants under him, and one of them was his general agent in Texas. But I instruct you that he is not concluded. He was no party to

45 the suit, and did not undertake the defence of it. A landlord may, if he chooses, come in and defend an action brought against his tenant for the land, but he is not bound to do it. The tenant may be under such complications that the landlord's defence would be prejudiced thereby. The landlord, if he prefer, may await the event of the action, and if his tenant is ousted may then bring his own action, as has been done here, and try his title on its own merits, unembarrassed by the peculiar complications in which his tenant may have been involved.

From what has been stated, it appears that Connett obtained possession of the land through W. H. and J. H. Williams, and acquired all the title which they or the heirs of Samuel M. Williams had therein; so that the plaintiff claims under the administrator of S. M. Williams, and the defendants (or rather Connett, their landlord) claim under
46 the heirs of S. M. Williams. The question is, which has the better title.

It is admitted that Sam. M. Williams owned the land when he died, in September, 1858.

Now, the nature of the two titles claimed by the respective parties is this:

When a man dies his estate is first subject to his debts. After they are paid it goes to his heirs. I speak of real estate. It is substantially the same with personal property. The claim of creditors is superior to that of the heirs. The legal title of the property descends to the heirs, it is true, and if there are no debts, or if the heirs choose to pay them, their title is clear and good. But if there are debts unpaid, the executor or administrator may obtain from the probate court an order to sell the lands or any portion of them, and such sale will defeat the title of the heirs to the property sold.

In this case, therefore, if the sale made by the administrator was valid—if his deed was not void, for some defect in the proceed-
47 ings, or for some fraud committed by him or the plaintiff, the title of the plaintiff is the superior of the two.

The question then arises as to the validity of the administrator's deed or deeds, for, as I stated, there are two of them offered in evidence.

To sustain his title the plaintiff has produced in evidence—

1st. A judgement recovered by him against Sam. M. Williams in the circuit court of the United States, at Galveston, on the 28th June, 1850, for $26,736, and a judgement on that judgement, recovered in the same court, on the 11th of July, 1858, only two months prior to S. M. Williams' death, for the sum of $43,936.34. These judgements cannot be assailed here. They must be assumed as genuine and valid.

2nd. Various proceedings in the probate court of Galveston County, showing the appointment of W. H. Williams and Philip C. Tucker, as administrators of S. M. Williams, deceased; and, subsequently, on
48 the 30th of Dec., 1865, the vacation of the letters as to W. H. Williams, leaving Tucker sole administrator.

3rd. Certain proof as to the presentation of the claim under judgement to the administrator' and its allowance by them.

4th. An application in behalf of H. H. Williams, the plaintiff, Jan'y 25th, 1866, for an order upon the administrator, to show cause why he should not apply to have sufficient property of the estate sold to pay the judgement; the answer of the administrator, the order of the court, ordering a sale of the tract in question, Jan'y 30th, 1866; a report of sale; an order of court confirming the sale, and the two deeds from the administrator to the plaintiff.

To this title of the plaintiff, it is objected by the defendant, that the

judgement debt of H. H. Williams was not duly presented, allowed, and approved, and that the order of sale was therefore void, and that the deed executed by the administrator was also void.

49 But the validity of the order of sale cannot be questioned in this collateral way. This is not a revisory proceeding for examining the regularity or legality of that order. This court cannot set it aside nor inquire into any errors committed by the probate court in making it, if there were any. All it can do is to ascertain whether the probate court had jurisdiction of the matter. Of this I have no doubt. It is conceded that the court had jurisdiction of the succession of S. M. Williams, of which matter this order of sale was a part. But if that was not sufficient to support the order, we have the fact proved that there was a subsisting judgement; that it was duly presented to the administrator for allowance, and sworn to, and admitted, and registered by him; that the plaintiff applied to the court for an order calling upon the administrator to show cause why he should not apply to have

50 the land sold to pay the judgement, alleging that it had been duly presented, allowed, and approved; that the administrator appeared and answered the application, and that a hearing was had thereupon, and the order made for a sale of the land; that the sale was made, reported, and confirmed, and a deed ordered to be given, which was given accordingly. The application thus made to the court was under and in substantial pursuance of the 1315th article of Paschal's Digest, which declares that, when an administrator shall neglect to apply for an order to sell sufficient property to pay the claims against the estate that have been allowed and approved or established by suit, such executor shall be required by the chief justice, on the application of any creditor whose claim has been allowed and approved and established by suit, to present a statement, & etc., and on proof that a necessity exists for a sale to pay the debts, it shall be the duty of the chief jus-

51 tice to order such sale to be made. Having jurisdiction of the case by the application made, it was the duty of the probate court to ascertain whether the exigency existed which justified or required an order of sale to be made. It will be presumed, when brought up collaterally, that the court did its duty, and its judgement will be accepted and received without further question.

I hold, therefore, that the order of sale is binding on this court, and that the order confirming the sale and directing a deed to be made precludes inquiry into any irregularities in the proceeding. A deed by the administrator, in pursuance of the last order, conveyed a good title, unless the proceedings can be impeached for fraud, as hereafter stated.

[Reference was here made to the case of Converse & Co. vs. J. E. Williams, adm'r, lately decided by the supreme court of this State,

52 which was not regarded as laying down a different doctrine.]

The objection to the first deed of the administrator, that it recites an order of sale made in February term instead of Jan'y term, 1866, is not tenable. It was a mere clerical error, which does not invalidate the deed. If otherwise, the second deed secured it.

I therefore instruct the jury that the administrator's deed was good and valid to convey, and did convey, to the plaintiff the title which S. M. Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff in obtaining it.

If the plaintiff obtained the deed for the purpose of defrauding the creditors of W. H. & J. H. Williams, and especially S. S. Connett, then the plaintiff cannot recover, and you will find a verdict for the defendants.

This is the principal question for you to decide, viz, whether
53 the order of sale made by the probate court was procured by the plaintiff, in combination with W. H. and J. H. Williams, for the purpose of defrauding Connett out of his debt.

In deciding this question, you will assume that the judgement of the plaintiff against his brother, Sam'l M. Williams, was a good and valid one. If they agreed to it, none but the creditors of S. M. Williams can question its validity. It cannot be assailed in this suit.

You are also to assume that the judgement was duly presented to the administrators of S. M. Williams, and allowed by them, and approved by the proper judge of the probate court.

These points must have been decided, and are concluded by the action of the probate court on the application for an order of sale.

You are also to remember that the order of sale was made on
54 the 30th of January, 1866, whilst Connett did not obtain his judgement against the Williams' on the note in this court until the 9th of February, 1867, so that when the order of sale was applied for and made, the only legal demand which Connett held against the property in question, if the sale of slaves was a void transaction, was the trust-deed given by W. H. Williams to J. R. Nichols to secure a note which was assigned to Connett; and when he obtained that, I do not remember if it was shown by the evidence.

You are also to remember that the plaintiff, having a valid and legal claim against the estate of S. M. Williams, had a right to have any portion of the latter's estate applied to the payment of it, and whoever purchased any part thereof purchased subject to that right.

You are also to remember the rule of law that fraud must be proved, and cannot be presumed. If, however, it be proved to your sat-
55 isfaction that either the plaintiff or his agent, (for he is bound by the acts of his agent,) in collusion and combination with W. H. and J. H. Williams, or with the administrator, procured the order of sale to be made in order to defraud Connett, you will find for the defendant. If it be not so proved, you will find for the plaintiff.

If you find for the plaintiff you will have to assess his damages. They will be measured by the value of the timber taken by the defendants from the land during the year 1868, and, up to the time they left it, added to the fair rental value of the tillable land.

I do not think that the circumstances of the case require that you should give exemplary damages or smart money.

56 *Defendant's first bill of exceptions.*

Filed June 13, 1872.

M. HOPKINS, *Clk.*

In U. S. circuit court, western district Texas, Austin, law side. June term, 1872.

H. H. WILLIAMS, PLAINTIFF,
vs.
J. D. NASH ET ALS., DEF'TS. } No. 1054.

Be it remembered that, on the trial of the above cause, the plaintiff offered in evidence in the following order, and at the same time, the following deeds and certified copies from the proceedings of the probate court of Galveston County, in the matter of the succession of Samuel M. Williams, deceased.

Before introducing these deeds it was admitted that both parties deraigned title from the same grantee, S. M. Williams.

I. A certified copy of the application of the plaintiff, H. H. Williams, through his agent, J. H. Williams, for an order requiring P. C. Tucker, administrator of the said estate, to sell land to pay a certain claim. This application was filed the 21st day of January, 1866,
57 and service of it was accepted by said administrator on the 22 day of January, 1866, and was marked filed on the 21 day of January, 1866, and reads as follows:

In the matter of the estate of Samuel M. Williams, deceased. In Galveston County court, January term, 1866.

Now comes John Williams, the agent and representative in Texas of his father, Henry Williams, a citizen of the State of Maryland in the above-entitled cause, by his attorney, and moves the court that the administrator of Samuel M. Williams, deceased, be cited to appear and show cause why he should not make application to this hon. court for an order to sell enough of the property of said estate to pay a judgment obtained by the said Henry Williams against the said Samuel M. Williams to the amount of forty thousand dollars, which said
58 judgement was allowed and approved as a valid claim against said estate in October, 1859, with interest at 8 per cent. per annum, and in default of the administrator so appearing and showing cause, the said John Williams moves the court to order the sale of sufficient property of said estate to pay said debt and interest.

M. F. MOTT,
Att'y for John Williams.

GALVESTON, *Jan'y* 22, 1866.

The issuance of citation prayed for herein is waived. Notice of the defending of this motion is acknowledged, and the clerk of the court will please note my appearance in court in response to the motion.

PHILIP C. TUCKER, *Adm'r.*

II. A certified copy of the answer of the administrator in reply to said motion and application of H. H. Williams, filed on the 30th day of January, 1866.

Answer.—Filed Jan'y 30, 1866.

HENRY H. WILLIAMS
vs.
ESTATE OF SAMUEL M. WILLIAMS.

The administrator of Sam'l M. Williams' estate, responsive to the motion of Henry H. Williams, answer' and says that he admits it to be true that, in the life-time of his intestate, on the 28th of June,
59 A. D. 1850, the plaintiff recovered a judgement in the United States district court at Galveston, against the defendants, for the sum of twenty-six thousand seven hundred and thirty-six dollars debt. The judgement had not been cancelled or paid at the death of the decedent; that it was presented for allowance against said estate with the usual affidavit; that the same was allowed by the administrator for payment in due course of administration; he cannot say whether the same was approved by the chief justice of Galveston County; that it has been the

custom to register all claims presented against said estate; that, upon examination of his register, he finds a memoranda of the presentation of said claim, but not of the amount for which it was allowed, and he suggests that the creditors be held to strict proof thereof. He says that the reason why he has not endeavored to pay the debt is that said
60 H. Williams often *answered* him that the payment thereof would not be required; that it was a matter between brothers which he did not care to collect, & etc., which induced the administrators to believe that the debt would never be enforced. The debt has never been paid. The magnitude of the debt is such that without the permission of said Henry H. Williams for delay, provision would have to be made therefor.

PHILIP C. TUCKER,
Admin'r.

III. A certified copy of the order of sale entered by the court on the 31st of January, on the above papers, as follows:

In the matter of the estate of Samuel M. Williams, dec'd.

HENRY H. WILLIAMS, BY JOHN H. WILLIAMS, *vs.* ADM'R P. C. TUCKER. } On motion for sale, & etc.

61 On this day came on to be heard in this cause the motion of Henry H. Williams, by his agent, John Williams, asking that the administrator be required to sell sufficient property of the estate to pay a certain judgement obtained by the said Henry H. Williams in the United States district court, on the 28th day of June, A. D. 1850, for the sum of twenty-six thousand seven hundred and thirty-six dollars, with interest from date of rendition, and it appearing to the court that this claim has been duly allowed, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance with the prayer of the motion. And the administrator having designated the following described piece of property, it is ordered that he shall make public sale of one league of land situated on the left bank of the Colorado River, in the county of Bastrop, and designated on the map of the county as league 4, commencing the measu-
62 rement from a stake which was posted on the upper corner of league No. 3, from which, ten varas south, there is an elm marked 3, and one hundred varas north another elm marked 4. A line was run north 45° east 7,080 varas to a stake for a corner, from which, at 8 varas north 32° west, there is a cedar with two trunks (forked cedar) marked +, and twelve varas south 9° east there is a post-oak marked +. From this point a line was drawn north 45° west, 4670 varas, to a stake, from which, 2 varas north 30° west, there is a post-oak marked +, and 4 varas south 34° west, there is another post-oak marked +. From the point of last corner another line was drawn 3° west, 7,600 varas to the river Colorado, to the lower corner of the land of Wilbarger, which is a stake on the bank of the river, from which, 6 varas north 51° a Palo Blanco, 5 and 10 varas to the north 68° east, there is an ash marked 4.
63 From this point follows the river down to the place of beginning. Said sale to be made before the court-house door of Galveston County, on the 1st Tuesday in March, 1866, between the hours of 10 and 4 p. m., having first given twenty days' notice of the time, place, and terms of sale, as required by law, to the highest bidder and the best

bidder, on a credit of twelve months, the purchaser to execute his note and bond for security of the payment when due and a vendor's lien reserved. It is further ordered that the administrator make due report of his action in the premises to this court.

IV. A certified copy of the report of the administrator of the sale under the above order, and which was dated and filed the 15th of March, 1866.

Report of sale.

In the matter of the estate of S. M. Williams, county court, Galveston County.

64 Philip C. Tucker, adm'r of the estate of S. M. Williams, would respectfully represent that, in obedience to the orders of court, after due notice according to law, he exposed for sale, at public auction, on the first Tuesday in March, A. D. 1866, at the place and on the time required by law, the league of land situated in Bastrop County, Texas, about eight miles north of the town of Bastrop, on the right bank of the Colorado River, originally granted to S. M. Williams, and known as league No. four, when the same was struck off and adjudged to Henry H. Williams, of Baltimore, for the sum of sixty thousand dollars, on a credit of twelve months, secured by vendor's lien on the property, he being the highest and best bidder therefor. That said price is, in the opinion of the administrator, of fair price for the property. Wherefore he prays that said sale may in all things be approved, and a deed
65 ordered to be executed to said Henry H. Williams, on his complying with the terms of sale.

PHILIP C. TUCKER.

Sworn to and subscribed before me March 15, 1866.

OSCAR FARRISH, *Clk.*

V. A certified copy of the order confirming said sale.

Order of court conf'ing sale.

In the matter of the estate of S. M. Williams, desceased. Report and return of sale of a league of land by the adm'r, Tucker.

Came on to be heard this day the administrator's report of sale in the above-entitled estate of one league of land, ordered to be sold at the January term of the court, 1866; and, it appearing to the court that the said sale was fairly made in conformity with law, it is ordered that the same be approved and confirmed, and the report thereof re-
66 corded by the clerk; and that the said administrator, Philip C. Tucker, do make to the purchaser thereof, Henry H. Williams, title, on his complying with the terms of sale, to one league of land in Bastrop County, originally granted to Samuel M. Williams by the government of Mexico, on the left bank of the Colorado River, about 8 miles above the town of Bastrop, and known as league No. 4 on the map of Bastrop County, he being the purchaser thereof at the sum and price of sixty thousand dollars as per said report.

VI. Original deed from P. C. Tucker, administrator to the plaintiff for the land in suit, dated April 15th, 1866.

(Endorsed as follows:) 1054. U. S. C. C. Austin. Filed June 4, 1870. M. Hopkins. Deed. Philip C. Tucker, adm'r of S. M. Williams, to Henry H. Williams.

Filed for record at 3½ o'clock p. m., April 28, 1866.

H. W. BROWN,
Clerk C. C. Bastrop Co.

67 Received payment for Brown, in currency,

JNO. M. CLAIBORNE, *Clk.*

8 ackn't'm'ts, $2.00; rec'd'g fees, $2.00—$4.00.

THE STATE OF TEXAS:

Know all men by these presents that, whereas I, Philip C. Tucker, administrator of the estate of S. M. Williams, dec'd, did, by order of the honorable the county court of Galveston County, rendered at its February term, A. D. 1866, offer for sale, at public outcry, on the 1st Tuesday in March, A. D. 1866, it being the 6th day of the month, in front of the court-house door of Galveston County, on a credit of twelve months, with ten per cent. interest, with a vendor's lien reserved to secure the payment of the purchase-money, the property hereinafter described, having given notice of said sale by publication in "Flakes Buletin," a newspaper published in said county, and by posting three notices
68 of said sale, one of which was in front of the court-house door of said county, and the other two in two other public places in said county, beyond the limits of the city of Galveston, for more than twenty days previous to said sixth day of March, A. D. 1866, when the same was struck off and adjudged to Henry H. Williams of Baltimore, Maryland, he being the best and highest bidder therefor, at the price and for the sum of sixty thousand dollars, and whereas said sale was by said court, afterwards, to wit, at its April term in all things ratified and confirmed and a deed ordered to be executed and delivered to the purchaser:

Now, in consideration of the premises and of the execution and delivery to me by said Henry H. Williams, of his said certain promissory note, dated at Galveston, on the 6th day of March, A. D. 1866, and pay-
69 able to my order, as administrator aforesaid, twelve months after date, for the sum of sixty thousand dollars, with ten per cent. interest from date, and to secure the payment of which a lien is herein and hereby reserved on the property hereinafter conveyed, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said Henry H. Williams, his heirs and assigns, and legal representatives forever, the following-described property, to wit:

All that certain tract or parcel of land lying, situated, and being in the county of Bastrop, and State of Texas, on the eastern bank of the Colorado River, about 8 miles above the city of Bastrop, known as league No. four, (4,) and was originally granted to Samuel M. Williams comprising four thousand four hundred and twenty-eight (4,428) acres of land, more or less.

70 To have and to hold all and singular the premises aforesaid with the improvements thereon situated and the hereditaments and appurtenances to the same belonging, unto him, the said Henry H. Williams, his heirs, legal representatives, and assigns, forever; subject, how-

ever, to the lien hereinbefore reserved to secure the payment of the note hereinbefore described.

(The words " sum of s," erased on the third line from the bottom of first page.)

In testimony whereof I hereunto set my hand and affix my scroll in lieu of seal at Galveston, this fifteenth day of April, A. D. 1866.

PHILIP C. TUCKER, (SEAL.)
Administrator of Est. of Sam. M. Williams.

Witness':
T. J. LEAGUE.
A. R. CAMPBELL.

THE STATE OF TEXAS,
County of Galveston:

71 Before me, Oscar Farish, clerk of the county court of Galveston County, this day appeared A. R. Campbell, to me known, who, being sworn, says that Philip C. Tucker, adm'r of the estate of Samuel M. Williams, signed and executed the above and foregoing instrument of writing in his presence, and that he at said Tucker's request subscribed his name witness thereto.

Given under my hand and the seal of said county court at Galveston, this the 19th day of April, A. D. 1866.

[SEAL OF COURT.] OSCAR FARISH, *Clk.*

[Stamp.]

In evidence that the within deed and certificate of authentication were at 3½ o'clock p. m., April 28, 1866, filed in my office for record and correctly recorded at 4 o'clock p. m., May 1, 1866, at pages 114 and 115 in book N, of Bastrop County deed records.

I hereto set my hand seal of office this 1st day of May, 1866.

[SEAL.] H. W. BROWN, *C. C. B. Co.*

[Revenue stamps.] [Revenue stamps.]

72 VII. Original deed of release of the same date from P. C. Tucker, administrator to the plaintiff, releasing vendor's lien.

Release of vendor's lien.

Administrator of S. M. Williams to Henry H. Williams, U. S. C. C. Austin, filed June 4, 1870. 1054.

M. HOPKINS, *Clk.*

Filed for record in my office, at 5 o'c'k p. m., the 20th day of April, A. D. 1867.

JNO. M. CLAIBORNE,
C. C. B. Co.

THE STATE OF TEXAS:

Know all men by these presents that I, Philip C. Tucker, administrator of the estate of Samuel M. Williams, dec'd, for and in consideration of the sum of sixty thousand six hundred and fifty dollars, to me in hand paid by Henry H. Williams, of Baltimore, Maryland, being the amount, principal and interest, due at this date on his note for sixty thousand dollars, dated March 6, 1866, and due twelve months after

date, with ten per cent. interest given for the purchase-money of league No. four, (4,) in Bastrop County, Texas, granted to Samuel M.
73 Williams, on the Colorado River, and to secure the payment of which a vendor's lien was reserved in deed for said property, dated April 15, 1866, do hereby acknowledge full payment of said note and release said property from said vendor's lien, and declare said property free of all encumbrance by reason thereof.

Witness my hand, at Galveston, this fifteenth day of April, A. D. 1866.

PHILIP C. TUCKER,
Adm'r of Est. of Sam'l M. Williams.

Witness':
T. J. LEAGUE,
A. R. CAMPBELL.

THE STATE OF TEXAS,
County of Galveston:

Before me, Oscar Farrish, clerk of the county court of Galveston County, this day appeared A. R. Campbell, to me known, who, being sworn, says that P. C. Tucker, administrator of the estate of Samuel M. Williams, signed and executed the above instrument of writing
74 in his presence, and that he, at said Tucker's request, subscribed his name as a witness thereto.

Given under my hand and the seal of said county court this 19th day of April, A. D. 1866.

[SEAL OF COURT.] OSCAR FARRISH, *Clerk.*

[Stamp.]

THE STATE OF TEXAS,
County of Bastrop:

I, Jno. M. Claiborne, clerk of the county court of Bastrop County, do hereby certify that the within instrument of writing was filed for record in my office, at 5 o'c'k p. m., the 20th day of April, A. D. 1867, and correctly recorded at twelve o'clock m., the 22d day of April, A. D. 1867, in book N, deed records of said county, page 411.

Witness my hand and the seal of our county court this 22d day of April, A. D. 1867.

[SEAL.] JNO. M. CLAIBORNE,
C. C. C. B. Co.

75 VIII. Second original deed from P. C. Tucker, administrator, to the plaintiff, for the land in suit, dated January 2, 1868, to wit:

Philip C. Tucker, adm'r est' of S. M. Williams, to Henry M. Williams. Deed. 1054. U. S. circuit c't, Austin, Texas.

Filed June 4, 1870.

M. HOPKINS, *Clk.*

Filed for record at 8 o'c'k, Jan'y 6, A. D. 1868.
JOSEPH GLOVER, *Clk C. C.*,
By W. A. HIGHSMITH, *Deputy.*

THE STATE OF TEXAS:

Know all men by these presents that whereas I, Philip C. Tucker, administrator of the estate of Samuel M. Williams, dec'd, did, on the

15th day of April, A. D. 1866, at Galveston, as said administrator, and in compliance with an order of the county court of Galveston County, execute to Henry H. Williams, of Baltimore, Maryland, a deed for a league of land in Bastrop County, about eight miles north of the town of Bastrop, on the east side of the Colorado River, granted to
76 Samuel M. Williams, and known as league number four, (4,) which said deed, for a more particular description, is here refer'ed to and made a part hereof; and whereas I did, in said deed, make several clerical errors in describing dates, now, for the purpose, therefore, of correcting said errors and making the said deed to said land correspond with the orders of said court, as should have been done in the first instance, I do hereby execute the following conveyance, to wit:

Whereas I, Philip C. Tucker, administrator of the estate of Samuel M. Williams, dec'd, did, by order of the honorable the county court of Galveston County, rendered at its January term, A. D. 1866, offer for sale at public auction, on the 1st Tuesday in March, A. D. 1866, it being the 6th day of the month, in front of the court-house door of Galveston County, on a credit of twelve months, with ten per cent. interest, with a vendor's lien reserved to secure the payment of the purchase-
77 money, the property hereinafter described, having first given notice of said sale by publication in Flake's Bulletin, a newspaper published in said county, and by posting three notices of said sale, one of which was in front of the court-house door of said Galveston County, and the others in two other public places in said county beyond the limits of the city of Galveston, for more than twenty days previous to said 6th day of March, A. D. 1866, when the same was struck off and adjudged to Henry M. Williams, of Baltimore, Maryland, for the sum of sixty thousand dollars; and whereas said sale was afterwards, to wit, at the March term of said court, in all things ratified, and confirmed, and approved, a copy of which said decree of confirmation is as follows, to wit:

"MARCH 30, 1866.

"IN THE MATTER OF THE ESTATE OF SAMUEL M. WILLIAMS, DEC'D. } No. 447.

78 "*Report and return of sale of a league of land by Administrator Tucker.*

"Came on to be heard this day the administrator's report of sale of the above-entitled estate of one league of land ordered to be sold, at the January term of the court, 1866, and, it appearing to the court that said sale was fairly made in conformity with law, it is ordered that the same be approved and confirmed and the report thereof recorded by the clerk, and that the said administrator, Philip C. Tucker, do make to the purchaser thereof, Henry H. Williams, title, on his complying with the terms of sale, to one league of land in Bastrop County, originally granted to Samuel M. Williams by the government of Mexico, situated on the left bank of the Colorado River, about eight miles above the town of Bastrop, and known as League No. four on the map of Bastrop County, he being the purchaser thereof at the sum and
79 price of sixty thousand dollars, as per said report."

Now, in consideration of the premises, and of the execution and delivery to me, by said Henry H. Williams, of his certain promissory note, dated at Galveston on the 6th day of March, 1866, and payable to my order as administrator aforesaid, twelve months after date,

for the sum of sixty thousand dollars, with ten per cent. interest from date, and to secure the payment of which a lien is herein and hereby reserved on the property hereinafter conveyed, have, and by these presents do grant, bargain, sell, and convey unto the said Henry H. Williams, his heirs and assigns and legal representatives forever, the following-described property, to wit:

All that certain tract or parcel of land situated and being in Bastrop County and State of Texas, on the east side of the Colorado River, about eight miles above the town of Bastrop, known as league
80 number four, (4), and was originally granted to Samuel M. Williams, comprising four thousand four hundred and twenty-eight (4,428) acres of land, more or less:

To have and to hold, all and singular, the premises aforesaid, with the improvements thereon situated, and the hereditaments and appurtenances to the same belonging, unto the said Henry H. Williams, his heirs, legal representatives, and assigns forever.

Witness my hand, at Galveston, this second day of January, 1868.

PHILIP C. TUCKER,
Administrator Est. of S. M. Williams.

In presence of—
A. R. CAMPBELL.
H. W. HAYS.

STATE OF TEXAS,
County of Galveston:

Be it known that, on this second day of January, A. D. one thousand eight hundred and sixty-eight, before me, E. P. Hunt, a notary public in and for the city and county of Galveston, duly commissioned and
81 sworn, personally came A. R. Campbell, to me personally known, and, being duly sworn, declares that P. C. Tucker, administrator est. of S. M. Williams, dec'd, acknowledged in his presence that he had subscribed and executed the annexed instrument of writing for the uses, purposes, and consideration therein stated, and that he, A. R. Campbell, signed the same at the request of said P. C. Tucker, adm'r.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office, at the city of Galveston, this day and year above-written.

E. P. HUNT, *Notary Public.*

THE STATE OF TEXAS.
County of Bastrop:

I, Joseph Glover, clerk of the county court of said county, certify that the foregoing deed, with the certificate of authentication, was filed for record at 8 o'c'ck a. m., January 6, A. D. 1868, and was, at 2 o'c'k p. m., January 11, 1868, correctly recorded in book letter "M," deed records, pages 619 & 620.

82 In testimony whereof I have set my hand and seal of office, day aforesaid.

[SEAL OF COURT.]

JOSEPH GLOVER, *Clk C. C.*
W. H. HIGHSMITH, *Deputy.*

To the introduction of each and all the above documents, the defendants, at the time when they were offered on the trial, objected, because the formalities and acts, required by law, to give the probate court jurisdiction and power to order the sale were not shown—because,

1st, the application for the sale was not made by the administrator, nor did it appear that the administrator had refused to make the sale; 2d, because there did not appear to have been made to the court or brought before it a statement or exhibit of the condition of the estate before the order was made, as required by law, in cases where the administrator declines to sell and a sale is sought to be had on the motion or application of a creditor; 3d, because it affirmatively appears
83 on the face of the record that the plaintiff, at the time of his application, was no such creditor of the estate as had a right to apply, and it appears affirmatively that there was no such authority in the court to order a sale for the payment of this debt, it not appearing from the record that his debt was established in the mode required by law, the record not disclosing that his debt was duly sworn to, allowed by the administrator, and approved by the chief justice, the order of sale reciting the sale to have been made on a claim allowed, and not on a claim allowed by the administrator and approved by the chief justice, and, because the record fails to show the amount of his debt or the date of its allowance by the administrator or the date of its approval by the chief justice; 4th, because the judgement debt, for which the court ordered the land sold, being one for $26,736, with interest from
84 the 28th of June, 1820, to date, is a different debt from the judgment debt of $40,000, set up by the plaintiff in his said application for a sale; 5th, because the deed of April 15, 1866, purports to be made by virtue of an order made at the February term of the court, and no such order was made.

For all these reasons the said defendants objected to the introduction of the first deed of the administrator, bearing date April 15th, 1866, and all the proceedings on which it purported to be based.

And to the second administrator's deed, dated the 2d of January, 1868, in addition to all the foregoing objections, it was further urged that said deed was void, and was incompetent evidence to establish any right—because, first, no order of court was produced showing any authority in the administrator to execute such an instrument; 2nd, because, having already executed a deed, (dated April 15,
85 1866,) the administrator was as to that matter functus officio, and had no power without an order of court to execute another deed for the same property; 3rd, because the deed did not convey the legal title to the plaintiff, being nothing but the private deed of P. C. Tucker; 5th; because the demise is laid in the petition on the 1st of January, 1868, and this deed is dated after that date, and on the 2nd of January, 1868.

The defendants objected to the release because it was made without the authority of law and in violation of the order recited.

The defendants objected to all and each of these instruments as failing to show power or authority in the administrator to convey the land to the plaintiff.

All of which objections of the defendants were by the court overruled, and each and all of the instruments set forth in this bill of
86 exceptions were read by the plaintiff to the jury as evidence, and upon their objection to said evidence being overruled the defendants excepted at the time, and asked and obtained leave to prepare their bill of exceptions.

And, during the further progress of the trial of said cause, the evidence of M. F. Mott was read, who was the attorney of record of said plaintiff in obtaining the foregoing orders of sale and confirmation, he being a witness for the plaintiff, was cross-examined by the defendants as to the

mode and manner and proof before the probate court, and when said order of sale was obtained, answered this in response to the following cross-interrogatories:

1st X-int'r to M. F. Mott, (alone). By an inspection of the records of the probate court of Galveston you will observe that you, in your
87 professional capacity as att'y, on the 21st of Jan'y, 1866, as attorney for H. H. Williams, (the p't'ff,) who was represented by his agent, J. H. Williams, in Texas, made application to the court for an order to the adm'r of S. M. Williams to sell property to pay a supposed debt due to said H. H. Williams. State if you had before you the claim of the said H. H. Williams against the estate of S. M. Williams on which your application was based; and, if yea, please state the amount of it, the date of its allowance by the adm'r of O. M. Williams, and also the date of its approval by the chief justice, and give the name of the chief justice who approved it, and also the name of the person making affidavit to the claim, and the officer before whom it was made. Please be particular and full in your answer to this.

Ans. to 1st X. I have not before me the claim alluded to. I pre-
88 sume it is among the papers in the matter of the administration of S. M. Williams, desceased, on file in the county clerk's office of Galveston county. I do not remember the amount of the claim, nor the date of its allowance; nor do I remember who made affidavit as to its correctness. Hon. E. T. Austin was county judge at the time the order of sale was obtained.

3rd X-int. to M. F. Mott, (alone.) State by whom were you retained to make the application for the sale. Did you receive any direct retainer from H. H. Williams, or was it through J. H. Williams? Please make a full, frank, and unreserved disclosure of the reasons which the pl'tiff or his agent gave you for desiring the application for sale to be made, and state all that passed between you at the time; and, if you had any reason whatever for believing that J. H. Williams had a secret interest
89 in having his homestead sold, please state all the facts at length on which you base such a calculation, and give also all the reasons that the plaintiff or his agent gave why it would be beneficial to the father to sell out the homestead of his son and agent, and state if you had any correspondence with H. H. Williams in this matter. These questions involve no breach of professional confidence, as the pl'tiff makes you his witness,

Ans. to 3 X-int. My recollection is that Mr. T. J. League requested me to make the application for order of sale on behalf of H. H. Williams, and said that he would see the fee paid. I accordingly made the application and used the name of J. H. Williams, because he was the general agent in Texas of H. H. Williams. I never had any conversation with J. H. Williams on the subject until after the sale had been confirmed, when he asked me the amount of my fee, and paid it
90 to me. I always considered that I had been directly retained by H. H. Williams, and that I was representing his interests. I never had any correspondence with H. H. Williams. I considered the employment by a brother att'y as sufficient warrant for my appearance, without a direct written power from my principal. I have no reason to suppose that J. H. Williams had a secret interest in having his homestead sold, nor did I ever know that his homestead was a part of the tract sold.

4th X-int. M. F. Mott, (alone.) Who paid you your fee for obtaining the order of sale, and when and in what manner was it paid?

Ans. to 4th X-int. J. H. Williams paid my fee for services. It was paid in money, and after the confirmation of the sale.

91 5 X-int. To M. F. Mott, (alone.) On Jan'y 30 the adm'r of S. M. Williams filed an answer to the petition drawn by you, in which he resisted, to some extent, the claim set up by H. H. Williams, for whom you were then acting, and at that term an order of court for the sale of the league of land in suit was obtained. Please answer and say at that term of court what evidence was offered by you to substantiate the claim of H. H. Williams against the estate of S. M. Williams, dec'd. Did you exhibit the claim duly allowed and approved; and if yea, from whom did you obtain it? Was it in the possession of J. H. Williams, and in whose possession is it now? And also please state what reason was given why the league in suit should be sold rather than any other property of the estate. In short, to be frank, was not the sale of this land gotten up by J. H. Williams for the purpose of defeating the claim of a person by the name of Connett, from whom J. H. W. had pur-
92 chased negroes; and did you not gather as much from the conversation of J. H. Williams? If not, then state why this land was sold rather than other land of the estate.

Ans. to the 5 X-int. The adm'r contested my application for order of sale, and the matter was referred to the court upon the proof. The matter was one of minor importance, so far as I was concerned, and my recollection of the facts not clear. My impression is that the proof was mostly oral. I proved, by one or two witnesses, who' now I do not recollect, that judgment had been obtained in the U. S. district court by H. H. Williams v. S. M. Williams, and also proved the destruction of the U. S. court records by fire, and, upon the proof, the chief justice adjudicated the matter and gave me the order of sale. I am clear that I never obtained any papers from J. H. Williams; in fact, though I used his name,
93 I had nothing to do with him in the business except to get my fee from him, as aforesaid. I know nothing whatever of the matters inquired of in the latter part of this interrogatory. I made an application for the sale of the land in question, because it was the most available piece of land belonging to the estate, and I used my judgment in doing the best I could for the interests of my client.

M. F. MOTT.

And the defendants introduced the complete record of all the proceedings had in the estate of Sam. M. Williams, deceased, which is in words to wit:

In county court, Galveston County.

THE STATE OF TEXAS,
County of Galveston:

IN THE MATTER OF THE ESTATE OF SAMUEL M. WILLIAMS, DEC'D. } No. 447.

94 Transcript of the original papers and proceedings filed and had in the above-named estate in said county court of Galveston County, as fully as the same appears of record and on file in said court.

Petition.—Filed Sept. 29, '58.

To the hon. the chief justice of Galveston County:

The petition of the undersigned, the surviving wife and children of the late Col. Samuel M. Williams, who departed this life the 13 inst.,

in this county, intestate, respectfully represents that a portion of the estate of the dec'd is situated in said Galveston County; that the position of some of the business affairs of the estate requires that letters of administration pro tem. be immediately issued:

Wherefore they pray that you will be pleased to issue such letters to Messrs. W'm H. Williams and P. C. Tucker, j'r, empowering them therein to take possession of the assets of said estate, and to take all steps necessary to ensure the payment of all debts due the estate,
95 and to save it from pecuniary loss by reason of the liability of said estate, arising from said Williams, deceased, having signed any written obligation as drawer, endorser, or surety.

Galveston, Sept. 25, '58.

A. M. WILLIAMS.
SARAH P. WILLIAMS.
MARY D. WILLIAMS.
CAROLINE L. WILLIAMS.

Witness:
MARY J. SCOTT.

Bond of adm'r pro tem.—Filed Sept. 29, '58.

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents that we, W'm H. Williams and Philip C. Tucker, j'r, as principal, and T. J. League and L. A. Thompson as sureties, are held and firmly bound unto the chief justice of the county of Galveston, in the sum of ten thousand dollars; for the payment of which sum, well and truly to be made unto the said chief justice, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, signed with our hands, and sealed with our seals, the seals being scrawls, the 27 day of September, A. D. 1858.

96 The condition of the above obligation is such that, whereas the above-bound W'm H. Williams and P. C. Tucker, j'r, have been appointed by the chief justice of the county of Galveston administrators pro tem. of the estate of Samuel M. Williams, dec'd:

Now, if the said Williams and Tucker shall well and truly perform all the duties required of *him* under said appointment, then this obligation to be null & void; otherwise to remain of full force and effect.

W'M H. WILLIAMS. [.]
PHILIP C. TUCKER. [.]
T. J. LEAGUE. [.]
L. A. THOMPSON. [.]

App'd Sept. 29, 1858.

J. P. COLE,
Chief Justice of Galveston Co.

Oath.

I do solemnly swear that Sam. M. Williams, dec'd, died without leaving any lawful will, so far as I know or believe, and that I will well and truly perform all the duties of administrator of the estate of said Sam. M. Williams, dec'd.

W'M H. WILLIAMS.
PHILIP C. TUCKER, JR.

Sworn to & subscribed to before me 29th Sept., A. D. 1858.
OSCAR FARRISH, *Clk.*

97 *Letters pro tem.—Issued Sept.* 29, *A. D.* 1858.

In vacation in county court.

THE STATE OF TEXAS,
County of Galveston:

To all to whom these presents shall come:

It having been shown to the satisfaction of the chief justice of said county, that the interests of the estate of Samuel M. Williams, late a resident of Galveston County, dec'd, require the immediate appointment of an administrator pro tem., and the heirs thereof desiring, by petition now on file in the county court of said county, such appointment to be confer'ed upon W'm H. Williams and P. C. Tucker, j'r: wherefore, in consideration of the premises, I, James P. Cole, by virtue of authority in me vested as chief justice of said county, do hereby appoint W'm H. Williams and P. C. Tucker, jr., administrators pro tem. of the estate of said Samuel M. Williams, dec'd, vesting them with full power to take possession of said estate, and to take all necessary steps to insure the payment of all debts due the estate, and to save it from pecuniary
98 loss by reason of the liability of said estate, arising from said Williams, dec'd, having signed any written obligation as drawer, endorser, or surety.

In witness whereof I hereunto sign my name and caused to be affixed the seal of said county court, with the attestation of the clerk thereof, this 29th day of September, A. D. 1858.

[L. S.] J. P. COLE,
Chief Justice Gal. County.

Attest: OSCAR FARRISH, *Clerk.*

Petition for letters-in-chief.—Filed Sept. 29, '58.

To the hon. chief justice of Galveston County:

The petition of the undersigned, wife and children of the late Col. Samuel M. Williams, of said county, who departed this life in said county on the 13th inst., intestate, respectfully sheweth that it is their wish that W'm H. Williams and P. C. Tucker, jr., be appointed permanent administrators of the estate of said Col. Samuel M. Williams, dec'd, and they pray that you will be pleased to issue letters of administration accordingly.

Galveston, Sept. 29, 1858.

A. M. WILLIAMS.
SARAH P. WILLIAMS.
MARY D. WILLIAMS.
CAROLINE L. WILLIAMS.

Witness:
MARY J. SCOTT.

99 *Notice.—Posted Oct. 15, '58.*

In county court, Oct. term, 1858.

THE STATE OF TEXAS,
County of Galveston:

A. M. Williams, Sarah P. Williams, Mary D. Williams, and Caroline Williams, surviving wife and children of the late Sam'l M. Williams, dec'd, having filed their application in said court for the appointment of W'm H. Williams and P. C. Tucker as administrators of said estate, notice is hereby given to all concerned to file their objections to said application, if any they have, on or before the Oct. term next of said court, when said application will be considered by the court.

In witness whereof I, Oscar Farrish, clerk of the county court of said county, hereto subscribe my name and affix the seal of said county court this 15th day of October, A. D. 1868.

OSCAR FARRISH, *Clk.*

Order of court for letters.—Oct. term, 1858.

IN THE MATTER OF THE ESTATE OF SAM'L M. WILLIAMS, DEC'D. } No. 447.

100 Application of S. W. Williams, Sarah Williams, Mary D. Williams, Caroline L. Williams, for the appointment of W'm H. Williams and P. C. Tucker as administrators of said estate.

It appearing to the satisfaction of the court that the widow of said dec'd, as well as the children, waive their right to administration upon said estate, by making application in behalf of W'm H. Williams and P. C. Tucker, j'r, and that due notice of said application has been given according to law, and no objection being filed or made thereto, it is therefore ordered, adjudged, and decreed, that letters of administration on the estate of said Sam'l M. Williams, issued to the said W'm H. Williams and P. C. Tucker, j'r, upon their taking and subscribing the oath by statute prescribed, and upon their executing and filing bond, with approved security, in the sum of two hundred thousand dollars.

101 It is further ordered, that Oscar Farrish, J. S. Jones, and H. Stuart be, and they are hereby, appointed appraisers of said estate, commission therefor to issue upon the qualification of the administrators herein appointed.

Bond.—Filed Nov. 11, 1856.

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents that we, Philip C. Tucker, j'r, and William H. Williams, as principals, and Samuel B. Hurlburt, Thomas Jefferson League, and Naher B. Yard, as sureties, are held and firmly bound unto the chief justice of the county of Galveston, in the sum of two hundred thousand dollars; for the payment of which sum well and truly to be made unto the said chief justice, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents; signed with our hands, and sealed with our seals, the seals being scrawls, the 28th day of October, A. D. 1858.

The condition of the above obligation is such that, whereas the above

bound Philipe C. Tucker, j'r, and W'm H. Williams, have been
102 appointed by the chief justice of the county of Galveston administrators of the estate of Samuel M. Williams, desceased:

Now, if the said Philip C. Tucker, j'r, and W'm H. Williams, shall well and truly perform all the duties required of them under said appointment, then this obligation to be null and void; otherwise to remain of full force and effect.

PHILIP C. TUCKER, 'JR.
W'M H. WILLIAMS. [S.]
J. B. HURLBUT. [S.]
T. J. LEAGUE. [S.]
N. B. YARD. [S.]

Approved Oct. 28, A. D. 1858.

J. P. COLE,
Chief Justice of Galveston County.

I do solemnly swear that Samuel M. Williams died without leaving any lawful will, so far as I know or believe, and that I will well and truly perform all the duties of administrator of the estate of said Samuel M. Williams, dec'd.

PHILIP C. TUCKER, J'R.
W'M H. WILLIAMS.

Sworn to and subscribed before me, Oct. 28, 1858, by P. C. Tucker, and on the 11th Nov., 1858, by W'm H. Williams.

OSCAR FARRISH,
Clerk of the County Court of Galveston Co.

103 *Letters of adm'r.—Issued Nov.* 11, 1858.

In county court, Oct. term, 1858. No. 447.

THE STATE OF TEXAS,
County of Galveston:

To all to whom these presents shall come:

Know ye, reposing trust and confidence in the ability and integrity of Philip C. Tucker, j'r, and W'm H. Williams, I, James P. Cole, chief justice of the county of Galveston, by virtue of authority in me by law vested, do hereby appoint the said Tucker and Williams administrators of the estate of Samuel M. Williams, dec'd, hereby vesting them with all the powers, rights, and privileges legally appertaining and belonging to such appointments.

In witness whereof I hereto subscribe my name and cause to be affixed the seal of the county court of Galveston County, with the attestation of the clerk thereof, this 11th of November, A. D. 1858.

[L. S.]

J. P. COLE,
Chief Justice of Galveston County.

Attest:
OSCAR FAR'ISH.

Inventory, & etc.—Filed D'r 9, 1858.

To the hon. the county court of Galveston County:

The undersigned appraisers of the estate of Col. Samuel M. Williams, late of said county, dec'd, returns the following inventory and
104 appraisement of all of said estate shown to us by the administrators, all of which is community estate with Mrs. Sarah P. Williams, late wife of the intestate.

Personal estate.

	Valued at.
Household furniture:	
4 sets bedroom furniture	$200 00
1 set dining-room "	50 00
1 " parlor "	150 00
Hall furniture	25 00
Kitchen "	50 00
Horse and kind:	
1 gray horse	100 00
4 cows and claves	100 00
Carriage & etc.:	
1 buggy and harness	75 00
1 old barouche "	10 00
1 gold watch	100 00
1 diamond pin	50 00
Stock:	
10 shares Capital South Brazoria & Galveston Bay Canal Co.	10 00
10 shares capital stock Com. and Agr. Bank shares, $100.	1,000 00
100 shares Union Marine & Fire-Ins. Co.	1,400 00
Slaves:	
Hilliard Black, aged 31 years, fi'ld hand	1,200 00
Ben " " 27 " "	1,200 00
Alek " " 16 " "	1,200 00
Jim " " 16 " "	1,200 00
Buk Giff, " 35 " "	700 00
Hester Black, " 14 house servant	800 00
Jule " " 13 "	700 00
Lucy " " 11 "	500 00
105 Paul Black, aged 5 years	400 00
Henry Griff, " 8 "	500 00
George Black, " 7 "	500 00
A negro woman, called Clara, in which the interest of the estate is about	650 00

REAL ESTATE.

In what co. in Texas.	Grantee.	No. of acres.	Memo.	
Brazoria Co	Cha's Garnett	2,200	West of B. R	$4,400 00
" "	H. Alsbury	2,200	" " "	550 00
Bastrop "	S. M. Williams	4,428	Wilbger Creek	10,000 00
" "	" "	2,200	Peach Creek	5,000 00
" "	James Waters	500	West of Colorado	1,200 00
Austin "	S. F. Austin	2,200	" " Brazos	5,500 00
" Co	S. M. Williams	1,400	" " Mill Creek	3,000 00
Bastrop "	" " "	4,428	South of San Antonio	2,214 00
Fayette "	" " "	7,200	On Buck Creek road on Norte	7,200 00
F't Bend "	Gal. City Co	20	Out-lots Nos. 86 & 61, No. 86 be'ng homestead	20,000 00
Galveston Co	Do.		One-half (south half) lot, block 503, corner of avenue E & 23 st, 13 & 14,	3,000 00
Harris Co	S. M. Williams	750	On Buffalo Bayou	750 00
Jefferson "	Geo. A. Pattells	2,200		1,100 00
Washington "	W. S. Brune	1,884	West of Brazos, above Washington	10,000 00
Austin Co	S. M. Williams	15	Two out-lots in the town of S. Felipe	10 00
Washington Co	" " "	354	On Brazos opposite to the town of S. F'lipe	1,770 00
Brazoria Co		177	Near the mouth of the Brazos	177 00
Liberty "	M. B. Menard	4,428		10,000 00
Harris " in the city of Houston; lots Nos. 23, 26, & 44, cont'g each 1¼ acres, containing 3¾ acres				100 00
106 Lot No. 48, containing 1 2-5 acres				
" " 54, " 13 9-5 "				
" " 58, " 9 3-6 "				
" " 61, " 293½ "				
" " 62, " 296 6-7 "				
				4,500 00

We, the undersigned appraisers, appointed by the court of Galveston County to appraise the estate of the late Col. Samuel M. Williams, have appraised the same, and say, on oath, that the price affixed, opposite to each piece or species of property, in the foregoing inventory, amounting, in the aggregate, to the sum of ninety-six thousand and sixty one dollars, is a fair and just appraisement thereof to the best of our judgement and belief, and the information before us.

JOHN S. JONES.
OSCAR FARRISH.

And we appraise the property, about which there is litigation, at nineteen thousand five hundred dollars, which will be found on the opposite page thereof.

JOHN S. JONES.
OSCAR FAR'ISH.

Sworn to subscribed to before me, D'r 9, 1858.

JOHN P. COLE,
Chief Justice, Galveston Co.

107	The following-named lands are yet in litigation in Fayette County, one-half league, Jno. Cook, grantee, valued at		6,000 00
Fayette Co.,	one-quarter league.	Jno. Hensley	3,000 00
Colorado "	" " "	Pety	3,000 00
"	" " " "	Day	3,000 00
"	" " " "	Gilleland	3,000 00
Fayette Co.,	" one-sixth "	Jno. Winn	1,500 00
			19,500 00

The last tract is held adversely, the parties claiming by prescription.

In addition to the lands mentioned in this inventory, the administrators deem it their duty to state that they have reason to believe that other lands exist, belonging to the estate of their intestate, the evidences of title to which have not come to their possession. In some instances it is known that grants of land were made to their intestate, and the testimonies and other evidences remained uncalled for in the office where they were issued for many years. As soon as procured an additional inventory will be returned embracing such lands as may come to their knowledge. There were also many locations of lands
108 made for the intestate by Horatio Christman, a surveyor; descriptions of which are not, at present, in the hands of the administrators.

The administrators of the late Col. Samuel M. Williams did return the following as a true list of the claims of the estate of their intestate, so far as they have come to their knowledge.

A claim against the heirs of Stephen F. Austin, dec'd, for the conveyance of one-half of all the premium lands granted or accruing to him as empressario in the colony of 100 families, by his contract with the government of Coahuila and Texas in 1827, on the east side of the Colorado River, above the San Antonio road, as evidenced by contract, and executed 4th of April, A. D. 1830, and delivered said Williams by said Austin.

James Lane's note, dated April 17th, 1850, at 90 days, with 8 per cent. interest from date for principal, ($150.00.) H. J. Jones' note of June 15, 1853, due Jan'y 1, 1856, for 907.00, less endorsements
109 to the amount of $10.88 interest. Thomas Afflate's four notes, dated July 5, 1856, for $1,923.75; each due, respectively, Feb'y 1, 1857; Feb'y 1, 1858; Feb'y 1, 1859; Feb'y 1, 1860, with interest at 8 per cent. p'r annum, secured by lien on real estate. Principal, 6,874.00.

A claim against the estate of Henry Jenkins, due for liability as his endorser, amount not yet accurately ascertained.

A claim against H. Crisman for lands and land-scrip, sold by him, amount not yet adjusted.

We, on oath, say that the foregoing inventory and list is a full and complete inventory and list of the property and claims of our intestate, that has come to our knowledge.

W'M H. WILLIAMS.
PHILIP C. TUCKER,
Adm'r of S. M. Williams' Est.

Sworn to and subscribed before me, Dec. 9, A. D. 1858.
OSCAR FARRISH.
Clk Gal'v't'n Co.

Additional inventory—Filed Feb'y 8, 1859.

Additional inventory S. M. Williams' estate.

110 County.	Original grantee.	No. acres.	
Starr.....	Raph'l Rainz.....	22, 582, or 5 1-10 leagues.	The land is known as Santa Rosalia; it is thought to be the property of the estate; the legal title is in McKinney and Williams; is valued at
Polk	James Perkins Jones.	690	On east San Jacinto, Cr. Valued at

We, on oath, say that the foregoing is a true inventory, to the best of our knowledge & belief.

PHILIP C. TUCKER, JR.,
W'M H. WILLIAMS,
Adm'r of S. M. Williams.

Sworn to and subscribed before me Feb'y 8, 1859.

OSCAR FARISH,
Clerk County Court.

Motion for year's support.—Filed Feb. 28, '59.

In co. c't Gal. Co., Feb'y, 1859.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D.

And now comes the administrators of the estate of Samuel M. Williams, dec'd, and moves the court to make an order for one year's support of the family of dec'd, as provided by the statute.

PHILIP C. TUCKER, JR.,
For self & Co., Adm'r.

111 *Order of court. Feb'y term,* '59.

IN THE MATTER OF THE ESTATE OF SAM'L M. WILLIAMS, DEC'D.

Application of the adm'r for allowance of the year's support of the widow and family of dec'd.

And, on said application coming on for a hearing, and the court being satisfied from intelligent men that it will require a sum not less than twenty-five hundred dollars for the year's support of the widow and family of said Samuel M. Williams, dec'd:

It is therefore ordered, adjudged, and decreed that the sum of twenty-five hundred dollars be, and the same is hereby, fixed as the year's allowance for the support of the widow and family of said Samuel M. Williams, dec'd; and the said administrator having represented to the court that he has no funds in his hands to pay such allowance, and having filed his petition praying for the order of sale of one hundred shares in the Union & Marine and Fire Insurance Company, it is therefore ordered

112 that said administrator of said estate sell said 100 shares at public auction, for cash, to the highest bidder, at the office of said company, in the city of Galveston, giving first, of the time, terms, and place of sale, due notice by publication in one of the newspapers of Galveston, and by posting notice thereof, as the law directs; and that they make due return and report of said sale to this court.

Petition for order of sale.—Filed Feb'y 28, 1859.

To the hon. the chief justice of Galveston County:

The petition of the administrators of the estate of S. M. Williams, dec'd, respectfully represent to your honor that, in order to support the family of the dec'd, in compliance with the order granted this day, it is necessary to sell some portion of the estate for want of money for imme-

diate use. Wherefore we petition for an order to sell 100 shares or certificates of stock in the Union Marine & Fire Insurance Company, of Galveston, Texas, being numbers of the capital stock of said company belonging to said estate.

TUCKER AND LEAGUE,
Att'ys for the Adm'rs.

113 *Order of court. Feb'y term*, 1859.

IN THE MATTER OF THE ESTATE OF SAMUEL M. WILLIAMS, DEC'D.

It is ordered that the additional inventory filed by the administrators of the estate of Samuel M. Williams, dec'd, be appraised by the original appraisers and recorded.

Report of sale.—Filed M'ch 28, '59.

Administrators' sale of insurance stocks.

THE STATE OF TEXAS,
County of Galveston :

By virtue of an order of the hon. county court of said county, made at its Feb'y term, 1859, we will sell at public auction, to the best bidder therefor, for cash, on the 12th day of March, A. D. 1859, at 11 o'clock a. m., at the door of the office of the Union Marine and Fire Insurance Company, on the strand, in Galveston, 100 shares capital stock Union Marine Fire Insurance Co., standing on the books of said company in the name of our intestate Samuel M. Williams, and belonging to the estate of Samuel M. Williams, dec'd.

Galveston, March 1, 1859.

W'M H. WILLIAMS,
P. C. TUCKER, JR.,
Administrators.

I, T. J. League, on oath, say that I posted three copies of the
114 above notice, one of which was at the court-house door of Galveston County, and the other two in different places in said county without the limits of Galveston City, ten days previous to the 12th day of March, 1859.

T. J. LEAGUE.

Sworn to and subscribed before me March 28, 1859.

OSCAR FARISH, *Cl'k.*

To the hon. the chief justice of Galveston County:

The administrators of the estate of the late Samuel M. Williams, dec'd, respectfully reports that, in compliance with the order of this court made at the last term, they advertised for sale, according to such order and the law, (as per proof herewith filed,) 100 shares of the capital stock of the Union Marine and Fire Insurance Co., and, agreeably to said notice and by virtue of said order, on the 12th day of March, A. D. 1859, at 11 o'clock a. m., at the door of the office of said insurance company, on the strand, in Galveston, they sold the shares at public
115 auction to the highest and best bidder therefor, for cash, viz: To Samuel B. Hurlbut, of Galveston, one lot of (20) shares, at

$19.05 per share, ($19.05;) one lot of 80 shares, at $19.06 per share, ($19.16;) amounting to the sum of nineteen hundred and thirteen dollars and 80 c'ts in money; all of which they pray may be approved and confirmed.

PHILIP C. TUCKER, JR., *Adm'r.*
W'M H. WILLIAMS,
Per his att'y in fact, PHILIP C. TUCKER.

Proceeds of sale, 1,913.80.
Expenses: advertising, ; postin', ; company, .
I, on oath, say that the above return is true and correct to the best of my knowledge and belief.

PHILIP C. TUCKER, JR.

Sworn to and subscribed before me this 28th March, 1859.
OSCAR FARISH, *Clk.*

Order of confirmation.

IN THE MATTER OF THE ESTATE OF }
SAM'L M. WILLIAMS, DEC'D. }

Report of sale by the administrator.

116 Upon inspecting the report of sale by the administrators of said estate, of one hundred shares of the capital stock of the Union Marine and Fire Insurance Company, and the proof accompanying the same, it appearing to the satisfaction of the court that the said sale was had, held, and conducted in a fair, public, and open manner, after due and regular notice thereof, as required by law and the order of sale, and that in all other respects the requirements of the law were fully observed, it is, therefore, ordered, adjudged, and decreed that said sale be in all things approved and confirmed, and that the report thereof be recorded. It is further ordered that the administrator assign and transfer said shares to the purchaser thereof upon his complying with the terms of sale.

Petition of surety for new bond.—Filed Apr. 4, '62.

To the Hon. James P. Cole, chief justice of the county court of Galveston County:

117 The petition of Samuel B. Hurlbut, of the county and city of Galveston, cammerunt, respectfully sheweth that he is one of the sureties of W'm H. Williams and Philip C. Tucker, administrators upon and of the estate of Samuel M. Williams, late of the county aforesaid, desceased, and, being desirous of being relieved from the obligation of the said bond for all future acts of the said administrators, therefore prays that the said William H. Williams and Philip C. Tucker be cited to be and appear at some convenient day, to be by your honor renominated and appointed, to give a new bond, so that petitioner may be relieved from all future acts of the said Williams and Tucker in the administration of the estate of the said Samuel M. Williams; and your petitioner, as in duty bound, will ever pray, and etc.

J. B. HURLBUT.

Order of court.—Apr. 4, '62,

In the matter of the estate of Samuel M. Williams, dec'd.

S. B. HURLBUT *vs.* ADM'R. } Petition, as bondsman, for adm'r to give new bond.

118 On reading and filing the petition of S. B. Hurlbut, one of the sureties of William H. Williams and Philip C. Tucker, administrators of the estate of Samuel M. Williams, dec'd, praying that said adm'rs may be required to give bond, and that he may be discharged and relieved from the future administration of said estate of Samuel M. Williams, deceased, it is ordered, adjudged, and decreed that citation issue requiring the said administrators of said estate to appear and give new bond as administrators of the said estate of Samuel M. Williams, dec'd, on or before the first day of April term of the county court of Galveston County, the said bond to be in the same penalty as before.

Citation issued.

In county court, April term, 1862.

THE STATE OF TEXAS,
County of Galveston:

The State of Texas to the sheriff of Galveston County:

119 Whereas, upon the petition of S. B. Hurlbut, one of the sureties of W'm H. Williams and Philip C. Tucker, administrators of the estate of Samuel M. Williams, dec'd, an order has been made by the chief justice of Galveston County, and entered of record in the minutes of said county court, requiring the said administrators to be cited to appear and give new bond in the same penalty as the former, on or before the April term of said court.

These are, therefore, to command you, in obedience to said order rendered on the 4th inst., to the said administrators, to appear and give new bond on or before the 1st day of the April term of the county court to be holden at the court-house of said co., on the last Monday in April; and have you there then this writ; herein fail not.

Witness Oscar Farish, cl'k of the county court of Galveston County, with the seal of said court, this 4th day of April, 1862.

[L. S.] OSCAR FARRISH, *Cl'k.*

120 *Service accepted.*

APRIL 5, 1862.

Service accepted.

PHILIP C. TUCKER, *Adm'r.*
WILLIAM H. WILLIAMS,
Per att'y in fact, P. C. TUCKER.

Order of court.—April term, 1862.

IN THE MATTER OF THE ESTATE OF SAMUEL M. WILLIAMS, DEC'D. }

Petition of S. B. Hurlbut, one of the sureties of adm'r bond, that they be required to give new bond, & etc.

And now, on this day, the administrator, in obedience to the order of this court rendered on the 4th of April, inst., in the cause appeared in

open court and tendered their new bond, and, the same being good and sufficient, it is ordered, adjudged, and decreed by the court that said bond be approved, filed, and recorded.

Bond.—Filed Apr. 28, 1862.

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents that we, W'm H. Williams and Philip C. Tucker, as principals, and Austin M. Williams, Naher B. Yard, and
121 Eleazer P. Hunt, as sureties, are held and firmly bound unto the chief justice of the county of Galveston, in the sum of two hundred thousand dollars; for the payment of which sum well and truly to be made unto the said chief justice, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, signed with our hands and sealed with our seals, the 24th day of April, A. D. 1862.

The condition of the above obligation is such that, whereas the above bound W'm H. Williams and Philip C. Tucker have been appointed, by the chief justice of the county of Galveston, administrators of the estate of Samuel M. Williams, dec'd:

Now if the said W'm H. Williams and Philip C. Tucker shall well and truly perform all the duties required of them under said appointment, then this obligation to be null and void; otherwise to remain of full force and effect.

WILLIAM H. WILLIAMS. [ ]
Per his att'y, PHILIP C. TUCKER.
122 PHILIP C. TUCKER. [ ]
A. M. WILLIAMS. [ ]
H. B. YARD. [ ]
E. P. HUNT. [ ]

Approved 28 Apr., A. D. 1862.

J. P. COLE,
Chief Justice of Galveston County.

Order of court.—Aug. term, 1865.

Chief justice ex-officio:

It is ordered that all administrators, guardians, and executors, who have failed to file an'ual exhibits and accounts, be cited to appear at the September term of this court, and show cause why they have failed to make such exhibits and reports.

Citation issued.—18th Sept., 1865.

In county court. Sept. term, 1865.

THE STATE OF TEXAS,
County of Galveston:

The State of Texas to the sheriff of Galveston County, greeting:

Whereas, at the Aug. term of said court, an order was rendered by the chief justice ex-officio requiring all executors, administrators, and guardians of estates, who have failed to file annu'l exhibits, to be cited to be and appear before said court at the September term, to be

123 holden at the court-house of said county, on the last Monday in September next, then and there to show cause why they have failed to file such exhibits and accounts; and whereas Philip C. Tucker and W'm H. Williams, of the estate of S. M. Williams, dec'd, comes within said order: these are therefore to command you to cite the said Tucker and Williams to be and appear before said court at said term, then and there to answer unto said order, and show cause as aforesaid, and have you then and there this writ certifying hereon how you have executed the same.

Witness the Hon. E. T. Austin, chief justice, with the seal of said court, this 18th day of Sept., 1865.

[L. S.] Teste: OSCAR FAR'ISH, *Clk.*

Return of sheriff on writ.

Came to hand the 18th Sept., 1865. Served by leaving a copy of the within writ with P. C. Tucker, Sept. 19, 1865.

J. R. ROMAINE,
Sheriff, Galveston County.

Exhibit.—Filed Sept. 26, 1865.

In county court, Galveston County.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS.

124 To the chief justice of said county:

The administrators of said estate herewith report the condition of the same, and, in answer to the citation from said court, report as follows:

That the condition of said estate remains in the same legal position as at the date of the last annu'l exhibit; there has been no other claims presented for allowance, and the administrators believe that all claims existing against the estate have been presented; that the heirs of S. M. Williams, with the approbation of the administrators and the tacit agreement of the creditors of the estate, have undertaken to liquadate and settle the debts of the same in their capacity as heirs, and as such, have sold a portion of landed interest of the same, and have paid off and discharged a large portion of the debts allowed against the estate, and have notes in their possession now past due, more than sufficient
125 to discharge the remainder.

That the estate has several suits depending in the courts of the various counties of the State of Texas, involving the title to tracts of land, and the principal reason for keeping the estate open is to enable those suits to be disposed of.

PHILIP C. TUCKER, *Adm'r,*
For himself & co-adm'r, W'm H. Williams.

Order of court.—September term, 1865.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D. } Citation vs. adm'r to show cause, & etc.

The adm'r comes into court in person, and, upon his representation and showing, it is ordered that this cause be continued till the October term hereof.

Order of court.—Oct.. term, '65.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D. } Citation for adm'r to show cause, & etc.

Continued at the request of the adm'r Tucker.

Petition for removal of W'm H. Williams as adm'r.—Filed Dec. 30, 1865.

In co. court, Galveston Co'nty.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D. }

To the Hon. E. P. Austin, chief justice of said county:

126 The petition of Marcus Campbell, who is a resident of Galveston, respectfully represents that your petitioner, on the eighteenth day of March, 1863, was married to Caroline L. Williams, who was the daughter and one of the heirs at law of S. M. Williams, dec'd, and whose estate administration is depending in said court, and W'm H. Williams and one Philip C. Tucker are administrators thereof; that said Caroline is still in life and is the wife of your petitioner; that said W'm H. Williams about five years removed from the county of Galveston, where he then resided, to the county of Bastrop, where he now resides, and has resided since said removal, and, though administrator as aforesaid, has ceased to attend to the interests of said estate, and has entirely abandoned the same; that, in September, 1862, he absented himself from the State of Texas, and went to Virginia, and was absent for a period of six
127 months, without the consent of said court; that, in January, 1864, he again absented himself from State and was in Mexico and Cuba for a period of over three months, without the consent of said court: The premises considered your petitioner prays that W'm H. Williams may be dismissed from said administration, and said Tucker be clothed with full power to conduct and manage said estate and close up the same.

MARCUS CAMPBELL.

Sworn to and subscribed before me Dec. 25, 1865.

OSCAR FARRISH, *Clk.*

Answer.—Filed Dec. 30, 1865.

In county court, Galveston County.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D. }

And now comes W'm H. Williams, and, in answer to the petition of Marcus Campbell, says he excepts to the sufficiency of the petition, and alleges that the same does not show sufficient cause to authorize the court to order his dismissal, and should his exception be overruled, then he denies all and singular the allegations in said petition contained.

Per T. J. LEAGUE,
Attorney.

128 *Order of court.—Dec'r term*, 1865.

In county court, Galveston Co.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D.

Marcus Campbell vs. W'm H. Williams, one of the adm'r. Petition for removal of.

The court having read the petition and the answer thereto, and because it appears therefrom that the said petition is well taken and sustained by facts, and that the said W'm H. Williams has forfeited his right to the administration, it is therefore ordered, adjudged, and decreed that the said W'm H. Williams, as one of the administrators of said estate of Samuel M. Williams, be, and he is hereby, removed from said administration from the date of the rendition of this decree.

Motion.—Filed Jan'y 21, 1866.

In Galveston County court, to Jan'ry term, 1866.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D.

Now comes John Williams, the agent and representative, in Texas, of his father Henry Williams, a citizen of the State of Maryland,
129 in the above-entitled cause, by his attorney, and moves the court that the administrator of Samuel M. Williams, deceased, be cited to appear and show cause why he should not make application to this hon. court for an order to sell enough of the property of said estate to pay a judgement obtained by the said Henry Williams against the said Samuel M. Williams, to the amount of forty thousand dollars, which said judgement was allowed and approved as a valid claim against said estate in October, 1859, with interest at 8 per cent. per annum; and in default of the administrator so appearing and showing cause, the said John Williams moves the court to order the sale of sufficient property of said estate to pay said debt and interest.

M. F. MOTT,
Att'y for John Williams.

GALVESTON, *Jan'y* 22, 1866.

The issuance of citation prayed for herein is waived. Notice of the defending of this motion is acknowledged, and the clerk of the court will please note my appearance in court in response to the motion.

PHILIP C. TUCKER, *Adm'r.*

Answer.—Filed Jan'y 30, 1866.

HENRY H. WILLIAMS
vs.
ESTATE OF SAM'L M. WILLIAMS.

130 The administrator of Samuel M. Williams' estate, responsive to the motion of Henry H. Williams, answer and says that he admits it is true that, in the life-time of his intestate, on the 28th of June,

1850, the plaintiff recovered a judgement in the United States district court at Galveston, against the defendant, for the sum of twenty-six thousand seven hundred and thirty-six dollars debt; the judgement had not been cancelled or paid at the death of the decedent; that it was presented for allowance against said estate with the usual affidavit; that the same was allowed by the administrator for payment in due course of administration; he cannot say whether the same was approved by the chief justice of Galveston County; that it has been custom to register all claims presented against said estate; that, upon examination of his register, he finds a memoranda of the presentation of said claim, but not of the amount for which it was allowed, and he suggests
131 that the creditors be held to strict proof thereof. He says that the reason why he has not endeavored to pay the debt is that said H. Williams often answered him that the payment thereof would not be required; that was a matter between brothers which he did not care to collect, & etc., which induced the administrators to believe that the debt would never be enforced. The debt has never been paid. The magnitude of the debt is such that, without the permission of said Henry H. Williams for delay, provision would have been made therefor.

PHILIP C. TUCKER, *Adm'r.*

Order of court.—Jan'y term, 1866.

In the matter of the estate of Samuel M. Williams, dec'd.

HENRY H. WILLIAMS, BY JOHN H. WILLIAMS, *vs.* ADM'R P. C. TUCKER. } Motion for order of sale.

On this day came on to be heard in this cause the motion of Henry H. Williams, by his agent, John H. Williams, asking that the administrator be required to sell sufficient property of the estate
132 to pay a certain judgement obtained by the said Henry H. Williams in the United States district court, on the 28th day of June, A. D. 1850, for the sum of twenty-six thousand seven hundred and thirty-six dollars, with interest from date of rendition; and it appearing to the court that this claim has been duly allowed, and that the administrator has no funds in hand whatever to pay the same, it is ordered that he make sale of sufficient property in pursuance of the prayer of the motion. And the administrator having designated the following piece of property, it is ordered that he shall make public sale of one league of land, situated on the left bank of the Colorado River in the county of Bastrop, and designated on the map of the county as league 4, commencing the measurement from a stake which was posted on the upper corner of league No. 3, from which, ten varas south,
133 there is an elm marked 3, and one hundred varas north, another elm marked 4. A line was run north 45° east, 7080 varas, to a stake for a corner, from which, at 8 varas north 32° west, there is a cedar with two trunks, (forked cedar,) marked +; and 12 varas south 9° east, there is a post-oak marked +. From this point a line was drawn north 45° west, 4,670 varas, to a stake, from which, 2 varas north 30° west, there is a post-oak marked +, and 4 varas south 34° west, there is another post-oak marked +. From the point of last corner another line was drawn 3° west, 7,600 varas to the river Colorado, to the lower corner of the land of Wilbarger, which is a stake on the bend of the river, from which, 6 varas north 51° west, a palo blanco, 5 and 10 varas to the

north 68° east, there is an ash marked 4; from this point following the river down to the place of beginning. Said sale to be made before the court-house door of Galveston County, on the 1st Tuesday in March, 1866 between the hours of 10 a. m. and 4 p. m., having first given
134 twenty days' notice of the time, place, and terms of sale, as required by law, to the highest bidder and the best bidder, on a credit of twelve months, the purchaser to execute his note and bond for security of the payment when due, and a vendor's lien reserved. It is further ordered that the administrator make due report of his action in the premises to this court.

Report of sale.—Filed March 15, 1866.

In county court, Galveston County.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D.

Philip C. Tucker, adm'r of estate of S. M. Williams, would respectfully represent that, in obedience to the orders of court, after due notice according to law, he exposed for sale, at public auction, on the first Tuesday in March, A. D. 1866, at the place and on the time required by law, the league of land situated in Bastrop County, Texas, about eight miles north of the town of Bastrop, on the right bank of the Colorado River, originally granted to S. M. Williams, and known as league
135 No. 4, when the same was struck off and adjudged to Henry H. Williams, of Baltimore, for the sum of sixty thousand dollars, on a credit of twelve months, secured by vendor's lien on the property, he being the best and highest bidder therefor; that said price is, in the opinion of the administrator, of fair price for the property. Wherefore he prays that said sale may in all things be approved, and a deed ordered to be executed to said Henry H. Williams on his complying with the terms of sale.

PHILIP C. TUCKER,
Of S. M. Williams.

Sworn to and subscribed before me, March 15, 1866.
OSCAR FARISH, *Cl'k.*

Order of court confirming sale—M'ch term, 1866.

IN THE MATTER OF THE ESTATE OF S. M. WILLIAMS, DEC'D.

Report and return of sale of a league of land by the Adm'r Tucker.

Came on to be heard this day the administrator's report of sale in the above-entitled estate of one league of land ordered to be sold
136 at the January term of the court, 1866, and it appearing to the court that the said sale was fairly made, in conformity with law, it is ordered that the same be approved and confirmed, and the report thereof recorded by the clerk, and that the said administrator, Philip C. Tucker, do make to the purchaser thereof, Henry H. Williams, title, on his complying with the terms of sale, to one league of land in Bastrop County, originally granted to Samuel M. Williams by the government of Mexico, on the left bank of the Colorado River, about eight miles above the town of Bastrop, and known as league No. four on the map

of Bastrop County, he being the purchaser thereof at the sum and price of sixty thousand dollars, as per said report.

Copy of judgement D. C., Fayette Co.—Filed July 13, 1867.

SAMUEL M. WILLIAMS *vs.* F. W. CHANDLER. } 1065. Land.

In this case appeared the parties, plaintiff and defendant, and
137 the death of the plaintiff being suggested, and Philip C. Tucker, administrator of the estate of the said Samuel M. Williams, in his own proper person appearing and asking to be, he is hereby made a party plaintiff to this suit, and the parties submitted to the court the following agreement, in writing:

In the district court of Fayette County, Texas.

S. M. WILLIAMS *vs.* F. W. CHANDLER. } No. 1065.

AND

S. M. WILLIAMS *vs.* F. W. CHANDLER ET AL. } No. 1635.

In these two causes now pending in said court, and file No. 1065 and 1635 therein, the following terms of compromise are agreed on, viz:

1. Decree shall be entered in either of the cases at the option of F. W. Chandler quieting title against the plaintiff, and the other suit shall be dismissed, and the plaintiff shall pay the legal costs of both suits, except any cash that any of the defendants may have already paid, which are not to be repaid; and the plaintiff is not bound for any
138 costs which are barred or wrongfully claimed. Before this agreement shall be binding, F. W. Chandler shall secure to the administrator of the plaintiff the sum of six hundred dollars, with interest, to be arranged to the satisfaction of William G. Webb, attorney of said administrator, and to be done as may be agreed on by said Chandler and said Webb, and to be in promissory notes, or note on other parties, endorsed by said Chandler, bearing interest from April last at ten per cent., or part in said notes and part on note of said Chandler, as may be agreed on between him and Webb.

Witness the hands and scrolls for seals of the said contracting parties on the 13th day of September, A. D. 1866, and said Chandler has paid the $600 in notes as above provided.

PHILIP C. TUCKER, [.]
Adm'r of S. M. Williams.

F. W. CHANDLER. [.]

It is therefore ordered, adjudged, and decreed by the court that this suit be dismissed, and that the plaintiff, Philip C. Tucker, admin-
139 istrator of Samuel M. Williams, do take nothing by his suit, and that defendant F. W. Chandler go hence without day.

It is further ordered, adjudged, and decreed by the court that the defendant, F. W. Chandler, do have and recover from the plaintiff Philip C. Tucker, administrator as aforesaid, all the legal cost of the suit not heretofore paid by the parties; and the clerk of this court is required to certify this instrument, with a bill of costs taxed herein, to the county court of Galveston County as an established claim against the estate of the plaintiff person.

Bill of costs.

	Specie.	Currency.
Clerk's fee due Theo. Carter:		
Dkt., 15; 3 app. ; 3 writ. copies of petition, &c., 1.50	95	2 93
1 copy jud, to Shaw. & writs serve'	1 75	2 41
1 " " McC'llan, " "	1 50	2 08
1 " " do. to "	2 00	2 75
1 " X " " Shaw	2 00	2 75
5 orders, 2.50; 1 can., 15; 1 cop. jud. to McKay	2 30	3 23
" " Williamson, 1.30; same to McKenny, 1.30	2 60	3 63
4 sp. di. ta. 2.00; 1 do. 50	2 50	3 75
1 order, 50; 1 can., 15; 4 aff 'ts, 1.00; 4 cert's, 2.00	3 65	5 00
1 order. 50; 1 can., 15; 6 aff 'ts. 1.50; 6 " 3.00	5 15	7 00
2 sub. du. tec., 1.00; 4 sub., 1.00; 1 sp., 35; 1 sp., 1.05	3 40	4 65
140 4 order, 2.00; 4 ca., 60; filing, 50; papers, 5	7 60	11 50
1 order, 50; 1 can., 15; cop. do.; 2 j'dgm't, 50; tax costs, 25; filing, 2.20	1 60	2 75
Copy jud., &c., 1.25; rend., $14.50; (6195)	15 60	20 80
Fees due W. B. McC'llan, cl'k:		
2 orders, 1.00; 2 can., 30	1 30	2 00
Serving 24 witnesses, 12.00; serving 4 notices, 3.00	15 00	16 00
Jury tax	5 00	5 00
Witnesses fees:		
Ja's Robinson, 2 days, 24 miles	3 44	
H. A. Farse 7 " 16 "	7 96	
W'm Sealdrau 9 " 34 "	11 04	
M. D. Ramsey, 7 " 24 "	8 44	
G. Scullion, 6 " 40 "	8 40	
J. Robinson, sen., 1 " "	1 00	
H. A. Tans, 11 " 16 "	11 96	
W'm Scullion, 6 " 9 "	6 54	
S. Scullion, 14 " 40 "	16 40	
M. D. Ramsey 8 " 24 "	9 44	
Notaries fees:		
Notary Cerdan, taking depositions	1 50	
" " " "	5 00	
" "	3 25	
" Anders, paid by def 't	1 06	95 43
	78 00	205 13

THE STATE OF TEXAS,
County of Fayette:

141 I, R. S. Bennett, for Theo. Carter, clerk of the district court in and for said county, that the foregoing are true copies of the original judgement rendered in said court, on the 23d day of May, 1867, in the foregoing stated cause and bill of the costs taxed therein.

In testimony whereof I hereto sign my name and affix the seal of said court, at office in the town of La Grange, the 1st day of July, A. D. 1867.

R. S. DAMETT, *Deputy*,
For THEO. CARTER,
Clerk Dist. Court, Fayette Co.

Judgement of D. C., Fayette Co.—Filed July 13, 1867.

SAMUEL M. WILLIAMS, ADM'R, *vs.* F. W. CHANDLER ET AL. } 1635. Land.

In this cause appeared the parties, plaintiff and defendant, by their attornies; the death of the plaintiff, Samuel M. Williams, being suggested, thereupon Philip C. Tucker, his administrator, and asked to be, and is hereby made a party plaintiff in this suit. And it being further suggested that Isaac B. McFarland, administrator of John H.
142 Chandler, deceased, has been removed, William M. Chandler, administrator de bonis non of said estate, is hereby made party defendant in this suit; and therefore the parties waived a jury and agreed that judgement should be rendered as per the following agreement, written, a copy of which is in the words and figures following, to wit:

In the district court of Fayette County, Texas.

S. M. WILLIAMS *vs.* F. W. CHANDLER, } No. 1065.

AND

S. M. WILLIAMS *vs.* F. W. CHANDLER ET AL. } No. 1635.

In these two cases, now pending in said court and file-numbers 1065 and 1635 therein, the following terms of compromise are agreed on, viz:

1st. Decree shall be entered in either of the cases at the option of F. W. Chandler, quieting title against the plaintiff, and the other suit shall be dismissed, and the plaintiff shall pay the legal cost of both suits, except any costs that any of the defendants may have already paid, which are not to be repaid, and the plaintiff is not bound for any costs which are barred or wrongly claimed.

143 2d. Before this agreement shall be binding, F. W. Chandler shall secure to the administrator of the plaintiff the sum of six hundred dollars, with interest, to be arranged to the satisfaction of William G. Webb, attorney of said administrator, and to be due, as may be agreed on by said Chandler and said Webb, and to be in promissory note or notes on other parties, endorsed by said Chandler, bearing interest from April last, at ten per cent., or a part in said note, and part in note of said Chandler, as may be agreed on between him and said Webb.

Witness the hands and scrolls for seals of the contracting parties, on this 13th day of September, 1866.

And said Chambers has paid the $600.00 in notes as above provided.

PHILIP C. TUCKER, [SEAL.]
Adm'r S. M. Williams, dec'd.
F. W. CHANDLER. [SEAL.]

It is therefore ordered, adjudged, and decreed by the court that the said plaintiff, Philip C. Tucker, administrator of the estate of
144 Samuel M. Williams, deceased, take nothing by this his suit.

It is further ordered, adjudged, and decreed by the court that the defendant F. W. Chandler have and recover of and from the plaintiff Philip C. Tucker, adm'r as aforesaid, the land described in the plaintiff's petition, situated in the county of Fayette, and bounded as follows, to wit: "The lower or eastern half of a certain league of land granted to John Cook, situated in said county of Fayette, on the right margin of the river Colorado, above and adjoining a tract of Andrew Castleman, and is known as league No. 6, and from the upper corner of a qua'ter of a league surveyed on said margin and numbered—which is a landmark—3 varas from a hackberry, to the south 46° east, marked 1, and an elm, 72 varas distant, to the south 20° west, marked 6; a line was run south, following the western boundary of said quarter league, and of said Castleman league, 9,877 varas, to the corner of said Castle-
145 man league; thence west, 3,000 varas, to a landmark; thence north 7,600 varas, to said river, at a stake on its margin, from which, a landmark, stands a sycamore marked 2, to the south 57° west, 69 varas distant, and a cedar, marked 6+, to the north 76° east, 90 varas distant; (the place where the landmark is set is a very high bank of the river and bare of trees;) and thence following the meanders of the river down to the beginning point.

It is further ordered, adjudged, and decreed by the court that the said F. W. Chandler be, and he is hereby, quieted in his title to the above-described land.

It is further ordered, adjudged, and decreed that the defendants do have and recover of the said plaintiff all the legal costs of this suit not heretofore paid by the parties, and that a copy of this judgement, with a bill of the costs taxed in this suit, be certified to the county court of Galveston County, as an established claim against the estate of S. M. Williams, dec'd.

146 *Bill of costs.*

	Specie.	Currency.
Fees due the clerk:		
D., 15; 1 app., 10; 2 mo., 1 00; 4 copies pet., &c., 8.00	9 25	12 61
Filing 3 pa., 30; 1 order, 50; 1 can., 15; copies doc., &c., 20	1 15	1 65
1 app., 10; jud., 20; tax cost, 25; re'd, 3.00; copy jug., &c., 1.25	5 00	7 11
Fees due W. B. McClellan, cl'k:	Specie.	Currency.
2 orders, $1.00; 2 cert., 30	1 30	2 00
Sh'ff N. F. Smith:		
Serving 3 writs	3 00	4 50
Sheriff Hood:		
Jury fee	50	50
" tax	5 00	5 00
	$25 30	$33 37

THE STATE OF TEXAS,
County of Fayette:

I, R. E. Bennett, deputy for Theo. Carter, clerk of the district court in and for said county, hereby certify that the foregoing are true copies of the original instruments rendered in said court on the 23rd day of May, A. D. 1867, in the foregoing stated cause, and bill of the costs taxed therein.

In testimony whereof I hereunto sign my name and affix the seal

147 of said court, at office in the town of La Grange, this the 1st day July, A. D. 1867.

[SEAL.] THEO. CARTER,
Clk Dist. Court F. C.
By his deputy, R. S. BENNETT.

THE STATE OF TEXAS,
County of Galveston:

I, Oscar Farrish, clerk of the county court of Galveston County and State aforesaid, do hereby certify that this and the foregoing forty-five pages contain a true and perfect transcript of the original papers and proceedings filed and had in the matter of the succession of Samuel M. Williams, deceased, as fully and completely as the same remained opened and on file in my office.

In testimony whereof I hereto subscribe my name and affix the seal of said county court this 1st day of April, A. D. 1868.

[SEAL.] OSCAR FARISH, *Clk.*

148 The above being the substance of the evidence adduced on this point.

And, during the progress of the trial, the defendants in this same connection asked the court to charge the jury as to the effect of the said orders and deeds, being set forth as follows, to wit:

U. S. circuit court for the western district of Texas, at Austin. Law side. June term, 1872.

H. H. WILLIAMS *vs.* J. D. NASH ET AL. } No. 1054.

VI.

Instructions asked by the defendants.

The plaintiff, in support of the issue on his part, and to show title for the land sued for, has offered in evidence a deed of the administrator of the estate of Samuel M. Williams, executed by virtue and under an order of sale of the probate court of Galveston County.

If said probate court had not jurisdiction to make said order of sale, then said sale is void, and the plaintiff by his purchase acquired no title.

149 The jury are further instructed that said court had no jurisdiction to order said sale unless the claim of the plaintiff, at whose instance and on whose application it was made, had been presented to and allowed by the administrator and approved by the chief justice. And in determining whether the court had jurisdiction, not only may the record be looked to, but also all the testimony outside of said record, which has gone to the jury, tending to prove the existance or non-existance of a claim of debt, allowed and approved as required by law, to give it some standing as a valid claim against said estate.

MOORE, HANCOCK & WEST,
Attorneys for the Defendants.

Disallowed. The charge covers the ground of this instruction and expressed the views entertained by the court.

Which the court declined to give, and of its own motion charged
150 the jury on this matter as follows:

"When a man dies his estate is first subject to his debts. After they are paid it goes to his heirs. I speak of his real estate. It is substantially the same with personal property. The claim of creditors is superior to that of the heirs. The legal title to the property descends to the heirs it is true, and if there are no debts, or if the heirs choose to pay them, their title is clear and good; but if there are debts unpaid, the executor or administrator may obtain from the probate court an order to sell the lands, or any portion of them, and such sale will defeat the title of the heirs to the property sold.

"In this case, therefore, if the sale made by the administrator was valid, if his deed was not void for some defect in the proceedings, or for some fraud committed by him or the plaintiff, the title of the plaintiff is the superior of the two.

151 "The question then arises as to the validity of the administrator's deed or deeds, for, as I stated, there are two of them, offered in evidence.

"To sustain his title, the plaintiff has produced in evidence—

"1st. A judgement recovered by him against Samuel M. Williams in the circuit court of the United States at Galveston, on the 28th of June, A. D. 1850, for $26,736, and a judgement on that judgement, recovered in the same court on the 11th July, 1858, (only two months prior to S M. Williams' death,) for the sum of $43,936.34. These judgements cannot be assailed here. They must be assumed as genuine and valid.

"2. Various proceedings in the probate court of Galveston County, showing the appointment of W. H. Williams and Philip C. Tucker as administrators of S. M. Williams, dec'd, and subsequently, on the 30th December, 1865, the vacation of the letters as to W. H. Williams, leaving Tucker sole administrator.

152 "3. Certain proof as to the presentation of the claim under the judgement to the administrators, and its allowance by them.

"4. Application on behalf of H. H. Williams, the plaintiff, Jan'y 25, 1866, for an order upon the administrator to show cause why he should not apply to have sufficient property of the estate sold to pay the judgement; the answer of the administrator; the order of the court ordering a sale of the tract in question, Jan'y 30, 1866; a report of sale, and the two deeds from the administrator to the plaintiff.

"To this title of the plaintiff it is objected by the defendant that the judgement-debt of H. H. Williams was not duly presented, allowed, and approved, and that the deed executed by the administrator was also void.

"But the validity of the order of sale cannot be questioned in this collateral way. This is not a revisory proceedings for examining
153 the regularity or legality of that order. This court cannot set it aside or enquire into any errors committed by the probate court in making it, if there were any. All it can do is to ascertain whether the probate court had jurisdiction of the succession of S. M. Williams, of which matter this order of sale was a part. But if that was not sufficient to support the order, we have the fact proved that there was a subsisting judgment; that it was duly presented to the administrator for allowance, and sworn to and admitted and registered by him, that the plaintiff applied to the court for an order calling upon the administrator to show cause why he should not apply to have the land sold to pay the judgment, alleging that it had been duly presented, allowed, and proved, that the administrator appeared, and answered the

application, and that a hearing was had thereupon, and the order
154 made for a sale of the land; that the sale was made, reported, and confirmed, and a deed ordered to be given, which was given accordingly. The application thus made to the court was under and in substantial pursuance of the 1315th article of Paschall's Digest, which declares that when an administrator shall neglect to apply for an order to sell a sufficient property to pay the claim against the estate that have been allowed and approved, or established by suit, such executor shall be required by the chief justice, on the application of any creditor whose claim has been allowed and approved and established by suit, to present a statement, & *etc.*, and, on proof that a necessity exists for a sale to pay the debts, &c., it shall be the duty of the chief justice to order such sale to be made, having jurisdiction of the case by application made. It was the duty of the probate court to ascertain whether the exigency existed, which justified or required an order of sale
155 to be made. It will be presumed, when brought up collaterally, that the court did its duty, and its judgement will be accepted and received without further question.

"I hold, therefore, that the order of sale is binding on this court, and that the order confirming the sale and directing a deed to be made precludes enquiry into any irregularities in the proceedings. A deed by the administrator in pursuance of the last order conveyed a good title, unless the proceedings can be impeached for fraud, as thereafter stated.

("Reference was here made to the case of Converse & Co. vs. J. E. Williams, adm'r, lately decided by the supreme court of this state, which was not regarded as laying down a different doctrine.)

"The objection to the first deed of the administrator, that it recited an order of sale made in February term instead of January
156 term, 1866, is not tenable. It was a mere clerical error, which does not invalidate the deed; if otherwise, the second deed remidied it.

"I therefore instruct the jury that the administrator's deed was good and valid to convey, and did convey, to the plaintiff the title which S. M. Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff in obtaining it."

To all of which matters both the action of the court in admitting the foregoing evidence when objected to, and its refusal to give the instructions asked by the defendants, as above set forth, and also its action in giving of its own motion the charge above set forth, the defendants at the time excepted in open court, and asked, and obtained leave to prepare their bill of exceptions, and, the same now being prepared, the defendants now here tender in open court this their first bill of exceptions, and ask that the same may be signed, sealed, and made a part of the record; which is accordingly done.

June 11, 1872.

JOS. P. BRADLEY, [SEAL.]
Asso. Justice Sup. Court U. S.

157 *Defendants' 2nd bill of exceptions.*

Filed June 13, 1872.

M. HOPKINS, *Clk.*

In U. S. circuit court for the western district of Texas, at Austin. Law side. June term, 1872.

H. H. WILLIAMS, PL'FF, *vs.* J. D. NASH ET ALS, DEF'TS. } No. 1054.

Be it remembered that, during the progress of the trial of said cause, the plaintiff, for the purpose of proving the existence, loss, destruction, and contents of a certain judgement asserted to have been rendered in the United States district court, at Galveston, in favor of the plaintiff against Sam'l M. Williams, offered the evidence of M. F. Mott, James Love, John B. Jones, and W. P. Ballinger, together with a purported copy of a certified copy of said judgement; which purported copy was in the handwriting of the plaintiff's son, J. H. Williams, which are as follows:

Depositions of Love, Jones, Ballinger, & Mott, &c.

In United States circuit court, western district of Texas, at Austin.

HENRY H. WILLIAMS *vs.* JOHN D. NASH, OSCAR NASH, JOHN VAN HAGEN, J. A. HOOPER AND JOHN ARMSTRONG. } 1054.

Interrogatories propounded to James Love, W. P. Ballinger, M. F. Mott, and J. B. Jones.

158 To all of said witnesses:

Int'y 1st. State whether or not you know the parties to the above-stated cause, and which of them?

To all of said witnesses:

Int'y 2. This suit is brought by the plaintiff, to recover from the defendants a league of land in Bastrop Co., Texas, known as league number 4, granted to Sam'l M. Williams, now deceased; and the plaintiff bases his right of recovery upon a title obtained from the administrator of Samuel M. Williams, dec'd, alleging that he paid the consideration in a judgement that he obtained against Sam'l M. Williams in his life-time. State whether or not you know of the said Sam'l M. Williams, in his life-time, being indebted to plaintiff. If so, please state the character of the indebtedness, and the am't, if you know or recollect it. If you do not recollect the precise am't, state as near as you can recollect, and your means of knowing. State whether or not the said Samuel M. Williams was indebted to plaintiff by account, note, or judgement, if you know, and your means of knowing.

159 To the witness James Love:

Int'y 3d. State whether or not you held any office in the years 1857, 1858, & 1859. If yea, what office did you hold? If you have answered that you held the office of clerk of the district court of the

United States, held at Galveston, for the eastern district of Texas, then please state whether or not the plaintiffs ever recovered a judgement in said court against Sam'l M. Williams, now deceased. If so, please state the date of said judgement, as near as you can recollect, and your means of knowing, and the amount of it.

To the witness James Love:

Int'y 4. If you have stated, in answer to the preceeding interrogatories, that you were clerk of the district court of the United States for the eastern district of Texas, at Galveston, in 1858, please state whether or not the records and papers in suits in that court have been destroyed by fire or otherwise. If yea, state when and where they were burned or destroyed. If you have at your command any copy or substantial copy of any judgement rendered in the said district court of the United States in favor of H. H. Williams against Sam'l M.
160 Williams, please attach it to your answer to this interrogatory, and mark it so that it can be identified; and state all that you know about it, if anything.

To the witness' W. P. Ballinger & J. B. Jones:

Int'y 5. State whether or not you ever acted as the attorney for the plaintiff in a suit against the said Samuel M. Williams, deceased. If yea, in what court, and when. If there was any judgement rendered in said suit, who was it in favor of, how much for, and the date of it; and state whether or not said judgement was paid by the said Samuel M. Williams in his life-time. If you have answered that any judgment was rendered in favor of the plaintiff against the said Samuel M. Williams, and you have access to a copy of the judgement or a substantial copy of the judgment, please attach it to your answer to this interrogatory, and mark it so that it may be identified.

To the witness' W. P. Ballinger & J. B. Jones:

Int'y 6th. If you have answered that the plaintiff recov'red a judgment in the district court of the United States, at Galveston, please state whether or not the papers and records in said cause have been destroyed by fire or otherwise, and how you know the fact.

161 To the witnesses W. P. Ballinger and J. B. Jones:

Int'y 7. Please state all that you may know, if anything, about the said Samuel M. Williams, now deceased, being indebted by judgment to the plaintiff, and the genuineness of the debt, and all your means of knowing as fully as if you were more specially interrogated?

To the witness M. F. Mott:

Int'y 8th. State whether or not you ever were the custodian of the records and papers of the United States district court, the sessions of which were held at Galveston, Texas, prior to 1861. If yea, please state how you became the custodian of said records and papers. State whether or not they are now in existence; and if not, what became of them, if you know, and all you may know about them, as fully as if you were more specially interrogated.

To the witness' W. P. Ballinger & James Love:

Int'y 9. Please state whether or not the said Samuel M. Williams is now living or dead. If you answer he is dead, then state, if you know, when he died.

We the undersigned attorneys for the defendants in the above stated and numbered cause, hereby waive the filing of the foregoing interroga-

tories, issuance of copy of the same by the clerk, service of same
162 by the marshal, and our right to have five days in which to cross in, and agree that the answers to the same may be taken at once to the originals without the issuance of any commission before any officer authorized by law under the State practice to take depositions, & to be returned in accordance with law.

HANCOCK & WEST,
Atty's for Def'ts.

JANUARY 13, 1869.

Def'ts' X-interrogatories:

To James Love (alone:)

1. Where do you now reside, and what is your age & occupation?

To M. F. Mott (alone:)

2. By an inspection of the records of the probate court of Galveston, you will observe that you, in your professional capacity as att'y, on 21st Jan'y, 1866, as att'y for H. H. Williams (the pl'ff,) who was represented by his agent, J. H. Williams, in Texas, made application to the court for an order to the adm'r of S. M. Williams, dec'd, to sell property to pay a supposed debt due to said H. H. Williams. State if you had before you the claim of the said H. H. Williams against the estate of S. M. Williams on which your application was based; & if yea, please state the amount of it, the date of its allowance by the administrator of
163 S. M. Williams, and also the date of its approval by the chief justice, & give the name of the chief justice who approved it, & also the name of the person making affidavit to the claim, & the officer before whom it was made. Please be particular and full in your answers to this.

To M. F. Mott (alone:)

3. State by whom were you retained to make the application for the sale. Did you receive any direct retainer from H. H. Williams, or was it through J. H. Williams? Please make a full, frank, and unreserved disclosure of the reasons which the plaintiff or his agent gave you for desiring the application for sale to be made, & state all that passed between you at the time; &, if you had any reason whatever for believing that J. H. Williams had a secret interest in having his homestead sold, please state all the facts at length on which you base such a conclusion; & give also all the reasons that the plaintiff or his agent gave why it would be beneficial to the father to sell out the homestead of his son & agent; & state if you had any correspondence with H. H. Williams in this matter. These questions involve no breach of professional confidence, as the pl'ffs makes you his witness.

To F. M. Mott (alone:)

164 4. Who paid you your fee for obtaining the order of sale, & when and in what manner was it paid?

To F. M. Mott (alone:)

5. On Jan'y 3d the adm'r of S. M. Williams filed an answer to the petition drawn by you, in which he resisted to some extent the claim set up by H. H. Williams, for whom you were then acting, & at that time an order of court for the sale of the league of land in suit was obtained. Please answer & say at that term of court what evidence was offered by you to substantiate the claim of H. H. Williams against the estate of S.

M. Williams, dec'd. Did you exhibit the claim duly allowed & approved; &, if yea, from whom did you obtain it. Was it in the possession of J. H. Williams, & in whose possession is it now? &, also, please state what reason was given why the league in suit should be sold rather than any other property of the estate. In short, to be frank, was not the sale of this land gotten up by J. H. Williams for the purpose of defeating the claim of a person by the name of Connett from whom J. H. W. had purchased negroes, & did you not gather as much from the conversations of J. H. Williams? If not, then state why this land was sold rather than other land of the estate.

To W. P. Ballinger (alone:)

165 6. Were you not once before examined in reference to the matters now inquired about it, in the case of S. S. Connett vs. J. H. Williams et als? If yea, state at whose instance you were examined & who was att'y for H. H. Williams in that case, & who represented him, & what att'y brought up your deposition from Galveston to Austin; & if you know the fee to be paid, or what was paid by H. H. Williams in that suit, please name the am't.

To W. P. Ballinger (alone:)

7. What were the reasons given to you in confidence by H. H. Williams & S. M. Williams when you first brought the suit, why it was best for H. H. W. to have a judgment against his brother? Was there not then or about that time a suit pending, brought by the St. Johns against McKinney & S. M. Williams, and which by its magnitude was calculated, if prosecuted vigorously, to overwhelm & ruin S. M. Williams; & was not this suit of yours brought for H. H. Williams for the purpose of shielding S. M. W. from other & perhaps less indulgent creditors? You will be pleased to disclose all the secret motives both of H. H. W. & S. M. Williams, as revealed to you for obtaining this judgment, & for keeping it alive. Was there ever an execution issued on it; & if not, why not? Please take your time & recall all that passed between you & H. H. & S. M. Williams when the suit was brought; & are you not mistaken
166 in saying that H. H. Williams was in Galveston when the suit was first brought? Be full and particular in all these points.

To W. P. Ballinger (alone:)

8. Did not you revive the judgment inquired about of H. H. vs. S. M. Williams for a special reason; & were you not in many matters the confidential adviser of S. M. Williams? & please state fully all the motives that actuated you in reviving the judgment. Did you have witnesses in certain events to press it? If yea, give your secret and confidential instructions on this subject.

To W. P. Ballinger (alone:)

9. When was your fee paid in the case of H. H. Williams vs. S. M. Williams inquired about? Give the month & year, & circumstances of the payment at the date of the revival of the judgement alluded to. Was not the State of Texas pressing vigorously informations or suits against S. M. Williams for illegal brokerage; & was it not for the purpose of rescuing him from destruction that the dormant judgement was revived?

To W. P. Ballinger (alone:)

10. Did you superintend the presentation of this judgement of H. H. W. vs. S. M. Williams to the adm'r of S. M. Williams? If yea, when
167 did you prepare the claim for presentation & who swore to it & at what date was it allowed by the adm'r, & when approved by the

chief justice, & what have you done with the claim so proved up, allowed & approved? Did you ever see it?

To John B. Jones (alone:)

11. Were you att'y for H. H. Williams in obtaining a judgement in 1850, in the U. S. district c't at Galveston, against S. M. Williams for about $26,736? If yea, state how you happened to be retained, & what was the object in having the judgement rendered. Please disclose the secret reasons given you by the two brothers, why one desired to confess judgement to the other. Give all the reasons fully & unreservedly; & state what was your fee, who paid it, & who acted as agent for H. H. Williams in paying it; & give the date of its payment.

HANCOCK & WEST,
Att'ys for Defendants.

168 Suit pending in the United States circuit court, western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN HAGEN, J. A. Hooper, and John Armstrong. } No. 1054.

Answers and depositions of James Love, W. P. Ballinger, M. F. Mott, & J. B. Jones to the annexed and accompanying interrogatories, propounded to them in the above-entitled cause, taken before Henry M. Trueheart, a notary in and for the county of Galveston, duly commissioned and sworn in accordance with the annexed and accompanying commission.

Answers of the witness John B. Jones.

To the 1st int'y he answers: I know the plaintiff. I do not think that I know either of the defendants.

To the 2 int'y he answers: From information derived from Sam'l M. Williams and the plaintiff, I learned that Samuel M. Williams was indebted to the plaintiff in a large amount of money, I think, over twenty-five thousand dollars. The indebtedness was by account. I learned this from both the parties, and, to the best of my recollection, from
169 the examination of the books of H. H. Williams, the plaintiff.

To the 5th int'y he answers: I did act as the attorney for plaintiff in this suit against Sam'l M. Williams in the district court of the United States, at Galveston. I don't remember the precise time, but think it was about 1850. Judgement was rendered in favor of the plaintiff, the precise am't I do not recollect, but think it was over twenty-five thousand dollars. I knew nothing of the payments of the judgement by Sam'l M. Williams in his life-time.

I am giving my depositions at my residence and have no access to the books and papers of my office.

To int'y 6th he answers: I have no personal knowledge of the destruction of the papers and records of said court, but have heard that they were destroyed.

To int'y 7th he answers: I know that Sam'l M. Williams was indebted to the plaintiff by judgement, as stated in my previous answers. I know nothing to indicate that the debt was not a genuine one. And from the declarations of the parties and the examination of the books of H. H. Williams I always supposed the debt genuine.

Answers to X-interrogatories.

To X-int'y 11th he answers: I was att'y for plaintiff in the suit
170 referred to. The precise amount of the judgement I do not recollect, but believe that it exceeded twenty-five thousand dollars. I had for some years been the general attorney for the plaintiff and attended to all matters in litigation in which he had an interest, and continued to act as his attorney for several years afterwards. I know of no particular object in having the judgement rendered, beyond what is usual in the obtainment of judgements. No secret reason was ever given me, to the best of my recollection. The plaintiff, H. H. Williams, expresses a desire to secure his debt by a judgement lien on the property of S. M. Williams, but there was no secresy about the matter, so far as I know. The fee was embraced in a general account against H. H. Williams, & not having access to my office and papers at this time, do not know the precise amount. I transferred all my interest therein to my son, G. A. Jones, and I learn from him that it was settled by John H. Williams as agent for H. H. Williams.

JNO. B. JONES.

Answers of the witness James Love.

To the 1st int'y he answers: I know the plaintiff, but do not know the defendants.

171 To the 2nd int'y he answers: As clerk of the United States district court I know that a judgement for a large amount was obtained by H. H. Williams against Samuel M. Williams. Samuel M. Williams was indebted to H. H. Williams in a large amount by judgement obtained in the United States district court. My means of knowledge arises from the fact that I was clerk of said court from 1848 to 1861.

To the 3d int'y he answers: In 1857 I was clerk of the United States district court for the eastern district of Texas, at Galveston. I was also clerk for the years 1858 & 1859. The plaintiff recovered a judgement in said court against Sam'l M. Williams, now deceased, the date of said judgement not recollected—the am't of the judgement I do not recollect. My means of knowing was that I was clerk of said court.

To the 4th int'y he answers: I do not know, of my own personal knowedge, that the records of said court were destroyed by fire, but have every reason to believe that such was the case. By the order of the judge of the Confederate States court I delivered the books and records of my office to Marcus F. Mott, who had been appointed clerk.

172 I have no copy or substantial copy of said judgement, and know nothing further than what I have stated about it.

Answers to cross-interrogatories.

To 1st X-int'y he answers: I reside at Galveston. My age is nearly seventy-four. My occupation, if I have any, is that of a lawyer.

JAMES LOVE.

(Copy.)

W. P. Ballinger, exhibit referred to in the answers of W'm P. Ballinger.

H. M. TRUEHEART,
Notary-Public, Galveston Co.

THE UNITED STATES OF AMERICA:

U. S. district court, eastern district of Texas, at Galveston, May term, 1858.

HENRY H. WILLIAMS
vs.
SAMUEL M. WILLIAMS.

Be it remembered that, on the 12th day of July, 1858, it being a day of the said May term of the United States district court for the eastern district of Texas, a judgement was entered in the above-entitled cause in words and figures as follows, viz: On this 12th day of July, A. D. 1858, came the plaintiff, Henry H. Williams, by his attorney, and the defendant, Samuel M. Williams, being solemnly called, came not but made default. It is therefore considered by the court, that the plaintiff recover of the defendant the damages he has sustained, by rea-
173 son of the non-payment of the demand sued on; and, it appearing to the court that the damages are liquidated, it is ordered that they be referred to the clerk to assess the same, whereupon he reported that the damages amounted to forty-three thousand nine hundred and sixty-six dollars and thirty-four cents. It is, therefore, considered by the court that the plaintiff recover of the defendants the sum of forty-three thousand nine hundred and thirty-six dollars and thirty-four cents, his damages by the clerk aforesaid assessed, and the further sum of eighteen dollars and fifteen cents, his costs by him about his suit in this behalf expended, for which execution may issue.

United States district court eastern district of Texas, at Galveston.

I, James Love, clerk of the United States district court eastern district of Texas, certify that the foregoing is a true and perfect copy of the judgement in the case of Henry H. Williams against Samuel M. Williams, rendered at the May term, 1858.

In witness whereof I have hereunto subscribed my name as clerk on the 5th day of April, 1858, and caused the seal of the court to be affixed.

[SEAL.] (Signed) JAMES LOVE.

174 Answer of the witness W. P. Ballinger to the interrogatories and cross-interrogatories hereto annexed propounded to him.

To 1st. I know H. H. Williams, and I presume I know John P. Nash and John Van Hagen; don't think I know any of the other parties.

To 2nd. I understood from both the parties that Sam'l M. Williams was indebted to Henry H. Williams; the first indebtedness, according to my remembrance, was the balance due on account. I don't think it had been settled by note on this balance of account; judgement obtained in the United States district court, Galveston, according to my office register, on the 28th June, 1850, for $26,736.00. Suit was afterwards brought on this judgement, and a second obtained in the same court, which, according to my register, was rendered July 12th, 1858, for $43,936.34 & $18.15 costs. My means of knowledge were, that I was attorney for Henry H. Williams in obtaining said judgements; that, at or about the time they were rendered, I made entry of the amount & date thereof on my business register, which I believe to be correct. I know of no other indebtedness than the above.

175 To the 5th. I did act as attorney for plaintiff, H. H. Williams,

in a suit against Sam'l M. Williams, deceased. The original suit was brought by Jones, Butler, & Ballinger as attorneys. It was in the United States district court for this district, at Galveston, and the first judgement was rendered by said court on the 28th of June, 1850, in favor of Henry H. Williams against Samuel M. Williams, for the sum of $26,736, on which another judgement was recove'd by the same plaintiff against same defendant in the same court, July 12, 1858, for the sum of $43,936.34, according to my business register as stated in last preceding answer. The said judgement was not paid by Sam'l M. Williams in his life-time, so far as I know. When John H. Williams informed me this day that he wished me to give my deposition in this case, he handed me what purports to be a copy of a certified copy of a judgement in the said case on the back of which I have written my name. I cannot say that said copy is accurate, and I notice the am't found due by the clerk, and that for which judgement was given, vary.

176 My own memorandum corresponds with the latter entry, and corresponds with the date. That is about the form in which judgements are usually rendered, but I have no personal remembrance at all of the precise terms of this judgement.

The judgement was, I am confident, in proper and usual form.

To the 6th. My understanding has been for several years that the papers and records of the United States court, Galveston, with a few exceptions of pending cases, were all burnt up in Houston, Texas, I think in the year 1862. I witnessed the fire and burning of the building, and I understood immediately afterwards from Mr. Mott, then the keeper of the records, that the Federal court records were in the building, and such has been commonly received and understood from that time to this.

To the 7th. I have stated all I know about said judgement. I believed at the time from the statements of both parties that the debt was genuine & bona fide; that Sam'l M. Williams actually owed Henry Williams the amount on which the first judgement was based. From my knowledge of both the men, and what I understood of their business

177 transactions, and all the surrounding circumstances at the time, I considered the debt actual and legal.

To the 9th. Sam'l M. Williams is dead. He died, I think, in the year 1859, though I have nothing at hand to refresh my memory, which is not retentive of dates.

To the 6th cross-interrogatory. I have given a previous deposition about this same matter, and in a suit or proceeding pending in the Federal court at Austin, the title of which I do not remember. My deposition was given at the request of F. W. Chandler, esq. Whether he took my deposition to Austin or not I do not know; nor do I know anything about the fee paid in the case, or by whom paid.

To the 7th cross-interrogatory. I cannot, at this distance of time, call to mind or recollect with exactness & fullness the conversation which occurred at the time with either H. A. Williams or Sam'l M. Williams, nor should I conceive myself at liberty to make any statements of the conversation of H. H. Williams to me as his attorney in the course of his professional business, if there had been any statements made by him of a confidential character. I have no recollection of any statement except that the debt was due; that it appeared & could be proved

178 by the books, and inquiry made as to the proof necessary before the court. Henry Williams said that he did not want to loose the debt, and wanted to prevent its being barred by limitation. He did not wish to harrass his brother, but to preserve the debt. There

was no allusion to the suit by Mrs. St. John, so far as I remember. There was a large claim by Mrs. St. John against McKinney and Williams, on which suit was brought in the Federal court—precisely when brought I do not remember. How far the prosecution of that claim influenced H. H. Williams to desire to obtain his judgement I do not know. Any statements by me on that subject would be only conjectural. I think execution did issue on the first judgement, and on the last also, but was not kept up regularly. I understood Henry H. Williams' object to be to preserve his debt in legal shape, but not to oppress his brother, towards whom I always considered him as entertaining feelings peculiarly kind, even for brothers. I do not think I am mistaken in the opinion that H. Williams was in Galveston when the suit was first brought. I am very certain he conversed with me about the claim & the institution of the suit prior to its institution. I am asked the secret motives of H. Williams and S. M. Williams. I have not attempted to conjecture in this matter beyond facts in my knowledge, and cannot answer the question further.

179 To the 8th. I have no knowledge or remembrance of any special reason, except that execution had not been kept up regularly. The judgement had become dormant, and Mr. H. H. W. expressed the wish to keep it in force, and instead of doing this by sci fa. I preferred a new judgement. I have no knowledge or recollection of instructions of the character inquired about. I was never the confidential adviser of Sam'l M. Williams. I was employed to defend the St. John suit, but it was, I presume, as the junior of Jones & Butler, both of whom were, no doubt, more regarded as his counsel than myself, tho', owing to the failure of Mr. Butler's health, & on subsequent division of labor, the case came more specially under my charge. I don't remember ever being his attorney in any other case. My relations with him were always very friendly, considering the great disparity in our age, but I never regarded myself, nor did any circumstance ever occur to authorize me to consider myself, his confidential advertiser.

To the 9th. When I became connected in the practice of law with Jones & Butler, in 1848, they were attorneys of Henry H. Williams, and we continued his attorneys, and had a considerable amount of business for him. Payments were made by him on account, but the fee in the

180 case against S. M. Williams was not specifically settled until since the close of the war. The settlement was made with J. B. & G. A. Jones, with my concurrence, and I think it was in Feb'ry, 1867. I do not remember the exact date of the information or suit of the State vs. S. M. Williams, for illegal banking. I know that a case or cases of that nature were pending for several years, but I never had any connection with them. If any reference was ever made to the pending of proceedings by the State against S. M. Williams, by H. H. Williams, as a reason for reviving his judgement, I do not remember it, though I cannot say that my memory is distinct on the subject. No impression was ever made on my mind of any purpose or act by H. H. Williams at all unfair or fraudulent in its character as respects said judgement or the proceedings by the State, but I deem it right to say in explanation of this that if I had known or supposed that the possibility that the State or any one else might recover a large judgement against Sam'l M. Williams was an inducement to H. H. Williams to see to it that his judgement would not thereby be postponed & lost, I would not have considered the motive an illegal or improper one, as I believed the debt honest & bona fide.

181 To the 10th. The only impression I have of my connection with

the prosecution of the claim is that, in 1859 or 1860, (before the war,) Henry H. Williams spoke to me about the steps necessary to put his claim in proper shape against the estate. I told him to get a certified copy of the judgement, make affidavit to it, & present it to the administrators of the estate of Sam'l M. Williams, and I supposed he would do this. I have no recollection of ever seeing the claim or being further connected with it, except on occasional conversation with John Williams about his father's business during the war & since the war, in which this claim was spoken of, but I have not considered myself as having superintended or given particular attention to the claim. I do not know, further than above stated, by whom it was sworn to, or any facts in respect to its allowance.

W. P. BALLINGER.

In U. S. circuit court, west. dist. of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN HAGEN, J. A. Hooper, and John Armstrong. } No. 1054.

Answer of M. F. Mott to the interrogatories propounded to him in the above-entitled & numbered cause.

182 Answer to 1st int'y. I know the plaintiff, but none of the defendants.

Answ. to 2nd int'y. I know nothing of the matters inquired of in this interrogatory.

Answ. to 8th int'y. In the year 1861 I was appointed clerk of the district court of the Confederate States for the eastern district of Texas, and the records of the United States district court were placed in my custody as such clerk. In the latter part of that year the court moved to Houston. I packed up all the records of the United States court *to* themselves, (with the exception of the pending suits on the law docket,) and stored them in a room in a fire-proof (supposed) brick building known as the Brashear building, which was entirely destroyed by fire in the winter of '61 and '62, together with all of said records. None were saved except those pertaining to the undecided cases pending on the law docket.

Answer to cross-interrogatories.

Answer to 2d cross-interrogatory. I have not before me the claim alluded to. I presume it is among the papers in the matter of the administration of S. M. Williams, deceased, on file in the county clerk's
183 office of Galveston County. I do not remember the am't of the claim nor the date of its allowance; nor do I remember who made affidavit as to its correctness. Hon. E. T. Austin was county judge at the time the order of sale was obtained.

Ans. to 3d cross-int'y. My recollection is that Mr. T. J. League requested me to make the application for order of sale on behalf of H. H. Williams, and said that he would see the fee paid. I accordingly made the application, and used the name of J. H. Williams, because he was the general agent in Texas of H. H. Williams. I never had any conversation with J. H. Williams on the subject until after the sale had been confirmed, when he asked me the am't of my fee, and paid it to me.

was no allusion to the suit by Mrs. St. John, so far as I remember. There was a large claim by Mrs. St. John against McKinney and Williams, on which suit was brought in the Federal court—precisely when brought I do not remember. How far the prosecution of that claim influenced H. H. Williams to desire to obtain his judgement I do not know. Any statements by me on that subject would be only conjectural. I think execution did issue on the first judgement, and on the last also, but was not kept up regularly. I understood Henry H. Williams' object to be to preserve his debt in legal shape, but not to oppress his brother, towards whom I always considered him as entertaining feelings peculiarly kind, even for brothers. I do not think I am mistaken in the opinion that H. Williams was in Galveston when the suit was first brought. I am very certain he conversed with me about the claim & the institution of the suit prior to its institution. I am asked the secret motives of H. Williams and S. M. Williams. I have not attempted to conjecture in this matter beyond facts in my knowledge, and cannot answer the question further.

179 To the 8th. I have no knowledge or remembrance of any special reason, except that execution had not been kept up regularly. The judgement had become dormant, and Mr. H. H. W. expressed the wish to keep it in force, and instead of doing this by sci fa. I preferred a new judgement. I have no knowledge or recollection of instructions of the character inquired about. I was never the confidential adviser of Sam'l M. Williams. I was employed to defend the St. John suit, but it was, I presume, as the junior of Jones & Butler, both of whom were, no doubt, more regarded as his counsel than myself, tho', owing to the failure of Mr. Butler's health, & on subsequent division of labor, the case came more specially under my charge. I don't remember ever being his attorney in any other case. My relations with him were always very friendly, considering the great disparity in our age, but I never regarded myself, nor did any circumstance ever occur to authorize me to consider myself, his confidential advertiser.

To the 9th. When I became connected in the practice of law with Jones & Butler, in 1848, they were attorneys of Henry H. Williams, and we continued his attorneys, and had a considerable amount of business for him. Payments were made by him on account, but the fee in the

180 case against S. M. Williams was not specifically settled until since the close of the war. The settlement was made with J. B. & G. A. Jones, with my concurrence, and I think it was in Feb'ry, 1867. I do not remember the exact date of the information or suit of the State vs. S. M. Williams, for illegal banking. I know that a case or cases of that nature were pending for several years, but I never had any connection with them. If any reference was ever made to the pending of proceedings by the State against S. M. Williams, by H. H. Williams, as a reason for reviving his judgement, I do not remember it, though I cannot say that my memory is distinct on the subject. No impression was ever made on my mind of any purpose or act by H. H. Williams at all unfair or fraudulent in its character as respects said judgement or the proceedings by the State, but I deem it right to say in explanation of this that if I had known or supposed that the possibility that the State or any one else might recover a large judgement against Sam'l M. Williams was an inducement to H. H. Williams to see to it that his judgement would not thereby be postponed & lost, I would not have considered the motive an illegal or improper one, as I believed the debt honest & bona fide.

181 To the 10th. The only impression I have of my connection with

the prosecution of the claim is that, in 1859 or 1860, (before the war,) Henry H. Williams spoke to me about the steps necessary to put his claim in proper shape against the estate. I told him to get a certified copy of the judgement, make affidavit to it, & present it to the administrators of the estate of Sam'l M. Williams, and I supposed he would do this. I have no recollection of ever seeing the claim or being further connected with it, except on occasional conversation with John Williams about his father's business during the war & since the war, in which this claim was spoken of, but I have not considered myself as having superintended or given particular attention to the claim. I do not know, further than above stated, by whom it was sworn to, or any facts in respect to its allowance.

W. P. BALLINGER.

In U. S. circuit court, west. dist. of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN HAGEN, J. A. Hooper, and John Armstrong. } No. 1054.

Answer of M. F. Mott to the interrogatories propounded to him in the above-entitled & numbered cause.

182 Answer to 1st int'y. I know the plaintiff, but none of the defendants.

Answ. to 2nd int'y. I know nothing of the matters inquired of in this interrogatory.

Answ. to 8th int'y. In the year 1861 I was appointed clerk of the district court of the Confederate States for the eastern district of Texas, and the records of the United States district court were placed in my custody as such clerk. In the latter part of that year the court moved to Houston. I packed up all the records of the United States court *to* themselves, (with the exception of the pending suits on the law docket,) and stored them in a room in a fire-proof (supposed) brick building known as the Brashear building, which was entirely destroyed by fire in the winter of '61 and '62, together with all of said records. None were saved except those pertaining to the undecided cases pending on the law docket.

Answer to cross-interrogatories.

Answer to 2d cross-interrogatory. I have not before me the claim alluded to. I presume it is among the papers in the matter of the administration of S. M. Williams, deceased, on file in the county clerk's
183 office of Galveston County. I do not remember the am't of the claim nor the date of its allowance; nor do I remember who made affidavit as to its correctness. Hon. E. T. Austin was county judge at the time the order of sale was obtained.

Ans. to 3d cross-int'y. My recollection is that Mr. T. J. League requested me to make the application for order of sale on behalf of H. H. Williams, and said that he would see the fee paid. I accordingly made the application, and used the name of J. H. Williams, because he was the general agent in Texas of H. H. Williams. I never had any conversation with J. H. Williams on the subject until after the sale had been confirmed, when he asked me the am't of my fee, and paid it to me.

I always considered that I had been directly retained by H. H. Williams, & that I was representing his interests. I never had any correspondence with H. H. Williams. I considered the employment by a brother att'y as sufficient warrant for my appearance, without a direct written power from my principal. I have no reason to suppose that J. H. Williams had a secret interest in having his homestead sold, nor did I ever know that his homestead was a part of the tract sold.

184 Answ. to 4th cross-int'y. J. H. Williams paid my fee for services. It was paid in money, and after the confirmation of the sale.

Answ. to 5th cross-int'y. The adm'r contested my application for order of sale, and the matter was referred to the court upon the proof. The matter was one of minor importance, as far as I was concerned, and my recollection of the facts not clear. My impression is, that the proof was mostly oral. I proved by one or two witnesses, (who now I do not recollect,) that judgement had been obtained in the U. S. district court by H. H. Williams vs. Sam'l M. Williams, and also proved the destruction of the United States court records by fire. And upon the proof the chief justice adjudicated the matter, and gave me the order of sale. I am clear that I never obtained any papers from J. H. Williams. In fact, though I used his name, I had nothing to do with him in the business except to get my fee from him, as aforesaid. I know nothing whatever of the matters inquired of in the latter part of this interrogatory. I made an application for the sale of the land in question because it was the most available piece of land belonging to the estate, and

185 I used my judgement in doing the best I could for the interests of my client.

M. F. MOTT.

THE STATE OF TEXAS,
County of Galveston:

I, H. M. Trueheart, a notary public in and for the county of Galveston, do hereby certify that the foregoing and hereunto-annexed answers and depositions of James Love, W. P. Ballinger, M. F. Mott, and J. B. Jones, the witnesses before named, were made before me, and sworn to and subscribed before me by the said witnesses respectively.

Given under my hand and official seal this the 16th day of February, A. D. 1869.

[L. S.] H. M. TRUEHEART,
Notary Public for Galveston County, Texas.

And in this connection the plaintiff proved by F. W. Chandler, that he had had in his possession a certified copy of said judgement, and that the copy attached he believed a true copy of the certified copy he had. His certified copy was lost and destroyed in the mail at Cummins' Creek, and J. H. Williams, in his presence, made four or five copies of this certified copy; and he believes the copy exhibited to be a true copy of said certified copy, but he cannot swear that this identical copy is one

186 of the copies that he compared with the certified copy, but he believes it to be a correct copy, and he sent a compared copy to the witness Ballinger.

To all which evidence the defendants objected at the time, because the proof introduced showed that there was better evidence of the fact in existence; because the parties failed to produce the certified copy that was presented to the administrator, and duly sworn to, as required by law; because the certified copy of the judgement contradicts itself,

and could prove nothing; because the parties had not complied with the law for proof of lost records, as defined in the law of this State; because the whole proof as to the existence, destruction, and contents of the judgement was incompetent and irrelavent, unless he could show that said judgement had been duly sworn to and allowed by the administrator, and approved by the chief justice, and ranked as a just claim against the estate of S. M. Williams, deceased. All which objections were overruled; and thereupon the defendants excepted at the time, and asked leave to propose their bills of exceptions, which was given. And the said bills being now prepared, they here, in open court, tender this their second bill of exceptions, and ask that the same may
187 be signed, sealed, and made a part of the record, which is accordingly done.

June 11th, 1872.

JOS. P. BRADL'Y, [SEAL.]
Asso. Justice Sup. C't U. S.

Defendant's 3d bill of exceptions.

Filed June 13, 1872.

M. HOPKINS, *Clk.*

Defendant's third bill of exceptions is indorsed as follows: "In U. S. circuit court, western district of Texas, at Austin. June term, 1872. Law side. H. H. Williams vs. J. D. Nash, et als. No. 1054. Defendant's third bill of exceptions. Filed June 13, 1872. M. Hopkins, clerk. Moore, Hancock & West, def'ts att'ys." And in words to wit:

In U. S. circuit court for the western district of Texas, sitting at Austin. Law side. June term, 1872.

H. H. WILLIAMS, PL'FFS, *vs.* J. D. NASH ET ALS., DEF'S. } No. 1054.

Be it remembered that, during the progress of the trial of said cause, the plaintiffs offered in evidence two depositions of the plaintiff, H. H. Williams, taken de bene esse, the one dated the day of June, A. D. 1868, and the other dated the 4th day of January, A. D. 1869. The first was as follows—being identical with the last, except in its account of witness's conversation with Paschal, which second deposition is
188 as follows:

The endorsement thereon as follows: "To the circuit court of the United States for the western district of Texas, at Austin, *Austin*, Travis Co., Texas. Rec'd from the post-office at Austin, & filed Jan'y 20, 1869. M. Hopkins, clerk. P. mark. Deposition of Henry H. Williams, taken before me, de bene esse, at Baltimore City, this day of January, 1869, to be used as evidence for plaintiff on the trial of this cause. Th. Harris Hodges, N. P. Opened by order of the court January 20th, 1869. M. Hopkins, clerk. Across the seal—Th. Harris Hodges, notary public. Received, Baltimore, this 8th day of January, 1869, from Th. Harris Hodges, notary public, this package, to be sent hence to its destination by the United States mail. E. Schriver, p. m., per C. T. Maddox, ass't p. m." And the same is in words as follows, to wit:

THE UNITED STATES OF AMERICA,
District of Maryland:

Be it remembered that, on this fourth day of January, A. D. 1869, at Baltimore City, in the district aforesaid, before me, Th. Harris Hodge, a notary public in and for the State of Maryland and city of Baltimore, personally appeared Henry H. Williams, of Baltimore City, in the State of Maryland, of sound mind and lawful age, witness for the
189 plaintiff in a civil suit now depending in the circuit court of the United States for the western district of Texas, at Austin, wherein Henry H. Williams is plaintiff, and John D. Nash, Oscar Nash, John Van Hagen, J. A. Hooper, and John Armstrong are defendants; and the said witness, being by me first carefully examined and cautioned, and duly sworn to testify the whole truth, and nothing but the truth, did thereupon depose and say that the debt on which suit was brought by me against Samuel M. Williams in the United States district court for the eastern district of Texas, at Galveston, and for which judgement was rendered in said suit in my favor by the said court on the 12th day of July, 1858, an alleged copy of which is annexed hereto, for the sum of forty-three thousand nine hundred and thirty-six dollars and thirty-four cents, or thereabouts, was an actual, honest, bona-fide debt against Sam'l M. Williams, and the items of said debt were all charged and shown by my books of account and by a judgement previously obtained June 28, 1850; that, since the rendition of said judgement, I have never been paid any part of it, to the best of my knowledge and recollection, either by Samuel M. Williams in his life-time, or by his legal representatives; that said judgement was obtained in my favor during my absence from Texas, by my attorney; that no part of said judge-
190 ment has ever been paid or secured to me, except what I received by my purchase of league number four, in Bastrop County, Texas, on the 1st Tuesday in March, 1866. Witness further deposes and says that, at and for a long time before, say eighteen months, more or less, after my son, John H. Williams, and my nephew, William H. Williams, purchased certain negroes from one Squire S. Cornett, giving their notes for the same, *that* I had no communication with said J. H. and W. H. Williams. I never advised them, or either of them, to make such purchase or supposed purchase, and I did not know of the same for a long time thereafter; that I have never since that time, either verbally or in writing, either to J. H. Williams, W. H. Williams, or to Squire S. Cornett, ratified or confirmed said trade or purchase in any manner; that I have never received or demanded any portion of the consideration, or pretended consideration, for which the notes of J. H. and W. H. Williams were given to Squire S. Cornett, nor did I ever expect or exact any. I was not privy to the trade or purchase between Squire S. Cornett and J. H. and W. H. Williams for negroes, which trade or purchase, it is alleged, was made in the year 1863, nor to any other trade made by and between the said Williams and Cornett. I had a conversation with Judge George W. Paschal, some time in the latter
191 part of last summer, according to the best of my recollection, for a few minutes, in a barber's shop, in the city of Baltimore, when he asked me if some compromise could not be made between me and Squire S. Cornett, when I replied that no proposition could be made by me, but that I was ready to listen to any they might feel disposed to make. Mr. Paschal said he was not authorized to make any, and that he was on his way to Texas. I informed him that my counsel there might be consulted. He represented to me the uncertainty of law-suits, and probably it would be for my interest to make a compromise, as, my

my claim being settled, it would give Cornett legal title to the land. I replied to him that I understood it was probable that the creditors of W. H. & J. H. Williams in bankruptcy would take an appeal from the judgement in favor of Cornett to the Supreme Court, and no doubt the judgment would be reversed; which is the substance of our conversation, as near as I can recollect.

HENRY H. WILLIAMS.

(Copy.)

THE UNITED STATES OF AMERICA:

U. S. district court, eastern district of Texas, at Galveston, May term, 1858.

HENRY H. WILLIAMS
vs.
SAMUEL M. WILLIAMS.

192 Be it remembered that, on the 12th day of July, A. D. 1858, it being a day of the said May term of the United States district court for the eastern district of Texas, a judgement was entered in the above-entitled cause in words and figures as follows, viz: On this 12th day of July, A. D. 1858, came the plaintiff, Henry H. Williams, by his attorney, and the defendant, Samuel M. Williams, being solemnly called, came not, but made default. It is therefore considered by the court that the plaintiff recover of the defendant the damages he has sustained by reason of the non-payment of the demand sued on. And it appearing to the court that the damages are liquidated, it is ordered that they be referred to the clerk to assess the same, whereupon he reported that the damages amounted to forty-three thousand nine hundred & sixty-six dollars & thirty-four cents. It is therefore considered by the court that the plaintiff recover of the defendant the sum of forty-three thousand nine hundred & thirty-six dollars and thirty-four cents, his damages by the clerk aforesaid assessed, and the further sum of eighteen dollars & fifteen cents, his costs by him about his suit in this behalf expended; for which execution may issue.

United States district court, western district of Texas, at Galveston.

193 I, James Love, clerk of the United States district court, eastern district of Texas, certify that the foregoing is a true & perfect copy of the judgement in the case of Henry H. Williams against Samuel M. Williams, rendered at the May term, 1858.

In witness whereof I have hereunto subscribed my name as clerk on the 5th day of April, 1858, and caused the seal of the court to be affixed.

[SEAL.] (Signed) JAMES LOVE.

And I, the said Th. Harris Hodges, notary public aforesaid, do certify that the reason for taking the foregoing deposition of the said witness, Henry H. Williams, is, that the same is necessary for the plaintiff in the said civil suit, in the caption mentioned, and that the said witness lives in the city of Baltimore, State of Maryland, more than one hundred miles from the city of Austin, in Texas, the place of trial of said civil suit.

I further certify that no notification was given to the adverse parties

to be present at the taking of said deposition and put interrogatories, if they should think fit, John S. Nash, Oscar Nash, John Van Hagen, J. A. Hooper, John Armstrong, the said adverse parties, nor any
194 attorney of theirs, residing or being within one hundred miles of Baltimore City aforesaid, at the time of taking said deposition.

I further certify that, on the date hereof, I attended the said witness, at his residence in Baltimore City aforesaid, he being sick; that the said witness, Henry H. Williams, was first carefully examined and cautioned, and duly sworn by me to testify the whole truth, and that the preceding deposition of said witness, Henry H. Williams, was by me reduced to writing in his presence, and from his statement to me at the time, and after being carefully read over to, and approved by, said witness, Henry H. Williams, subscribed the same in my presence, as the same appears, and I have retained the said deposition in my possession, without alteration for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition, with my own hand, to the court for which the same was taken.

I further certify that I am not of counsel or attorney to any one of the parties in said civil suit, or in any way interested in the event thereof.

Given under my hand and seal of office, this fourth day of January, A. D. 1869.

[L. S.] TH. HARRIS HODGES, *N. P.*

195 STATE OF MARYLAND,
Baltimore City, sct:

I hereby certify that T. Harris Hodges, esquire, before whom the annexed depositions were made, and who has thereto subscribed his name, was, at the time of so doing, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn, and that to all acts done by him in that capacity, full faith and credit are due & ought to be given, and that his signature thereto is genuine.

In testimony whereof I hereunto set my hand and affix the seal of the superior court of Baltimore City, this 4th day of January, A. D. 1869.

IMPRESS OF SEAL, SUPERIOR COURT OF BALTIMORE CITY.

[5-c. int. rev. stamp.]

GEO. ROBINSON,
Clerk of the Superior Court of Balt. City.

To the introduction of the first of which depositions, the defendants, at the time of its being offered, objected—

Because, I. The plaintiff had no right to give evidence in a cause by deposition; and, II. Because he has no right to give a de bene esse deposition.

To the second de bene esse deposition, each of the foregoing
196 objections were raised, and also the additional one, that no order of court had been obtained to authorize the taking of this second deposition. All of which objections were by the court overruled and the evidence permitted to be read to the jury; and, at the time, the defendants excepted and asked leave to prepare their bill of exceptions, and having prepared the same, they now, in open court, tender this, their third bill of exceptions, and ask that the same may be signed, sealed, and made a part of the record, which is accordingly done.

JOS. P. BRADLEY, [L. S.]
Asso. Justice Sup'r Court U. S.

197 And, afterwards, to wit, on June 13, 1872, defendants filed their fourth bill of exceptions, which is endorsed in words, to wit: No. 1054. In United S. circuit court, western district of Texas, at Austin, June term, 1872. Law side. H. H. Williams v. J. D. Nash et al. Defendant's fourth bill of exceptions, filed June 13th, 1872. M. Hopkins, clerk. Moore, Hancock & West, def'ts' att'ys." And is in words, to wit:

Defendants' 4th bill of exceptions.

In United S. circuit court for the western district of Texas, sitting at Austin. Law side. June term, 1872.

H. H. WILLIAMS, PL'FF, v. J. D. NASH ET AL., DEF'TS. } No. 1054.

Be it remembered that, on the trial of the above cause, the defendants offered, in evidence, the record and papers in a suit brought in the United States circuit court for the western district of Texas, at Austin, filed on the 7th day of December, 1867, by S. S. Cornett, against J. H. and W. H. Williams, being a suit of trespass, to try title and sequestration for the same land now sued for, which papers
198 were as follows, to wit, endorsed in words, to wit: "No. 1026. Squire S. Cornett vs. William H. Williams et al., 7. 7. 7. sequestration.

"We bind ourselves as security for costs in this suit, Dec. 5th, 1867.
"HANCOCK & WEST.
"J. A. & G. W. PASCHAL.

"Filed Dec. 7th, 1867. M. Hopkins, cl'k.

"This action is brought, as well to try title as for damages. Let the summons and sequestration issue.
"HANCOCK & WEST.
"J. A. & GEO. W. PASCHAL,
"*For Pl'ff.*

"Process & writ issued Dec. 9th, 1869.
"M. HOPKINS, *Clerk.*

"PASCHALS & H. & WEST, *for Pl'ffs.*"

And is in words, to wit:

UNITED STATES OF AMERICA,
State and District of Texas:

To the honorable Thomas H. Duval, judge of the circuit court of the United States for the district, held at Austin:

Your petitioner, Squire S. Connett, of the city of St. Joseph, in the county of Buchanan, of said State, brings this suit against William H. Williams, John H. Williams, and Eddie Williams, wife of W. H. Williams, and Anna C. Williams, wife of the said John H. Williams, of the county of Bastrop, in said State.

199 And thereupon your petitioner says that he is a citizen of the State of Missouri, and that the said defendants are citizens of

the State of Texas, and that they reside within the jurisdiction of said court which holds its sessions at Austin.

And, further, he says that he is the legal owner of all that certain tract of land in said county of Bastrop, fronting upon the east bank of Colorado River, about seven miles above the town of Bastrop, known as the league of land granted to Samuel M. Williams, and described as league No. 4. And your petitioner being so thereof possessed, the said defendants, afterwards, to wit, on the first day of May, A. D. 1867, with force and arms broke the close of your petitioner and entered upon said land; and from thence hitherto they have held possession of said land and all the appurtenances thereon, consisting of fields, houses, mills, store-houses, cotton-gin, still, stables, cabbins, and other improvements upon said property situated; and they have, with force and violence, cut and destroyed a large amount of timber of great value, to wit, of the
200 value of five thousand dollars, and other wrongs to said premises they have done to the great damage of your petitioner, to wit, ten thousand dollars; and your petitioner says that the said land and the rents and profits and use and occupation thereof are of great value, to wit, fifty thousand dollars. And your petitioner fears that the said defendants will make use of their possession to injure said property and to waste the fruits and revenue produced by the same and to convert them to their own use.

The premises considered, your petitioner prays for a sequestration against said defendants in accordance with the statute; that the defendants may be cited, and that at the time your petitioner may have judgment for the possession of said land for the damages thereto, for the rents and profits, use and occupation thereof, for his costs, and for such other general and special relief as he shall show himself entitled to.

HANCOCK & WEST,
J. A. & GEO. W. PASCHAL, &
O. M. WATKINS,
Att'ys for Pl'ff.

201 UNITED STATES OF AMERICA,
State and District of Missouri:

Before the undersigned, a commissioner of the United States circuit court for the State and district of Missouri, personally appeared Squire S. Connett, the plaintiff in the foregoing suit, who, on oath, says that the allegations and averments set forth in the foregoing petition, so far as stated upon his own knowledge, are true, and, so far as stated upon the knowledge of any other person, he believes them to be true. And, further, he says that he fears that the defendants in possession, named in said petition, will make use of their possession to injure said property and waste the fruits and revenue produced by the same, and convert them to their own use; and, therefore, he prays for a sequestration.

SQUIRE S. CONNETT.

Sworn to and subscribed before me this ninth day of September, 1867.

L. M. LAWSON,
Commissioner U. S. Circuit Court Missouri Districts.

202 Personally appeared before the undersigned authority, C. S. West, att'y, and acting for the pl'ff S. S. Connett, in the above and foregoing petition, and makes oath that the matters and things in the foregoing petition set forth are true to the best of his knowledge and belief. And he further swears that he fears that the def'ts above named,

who are in possession of the real estate above therein described, will make use of their possession to injure said property, & also to cut down and convert to their own use the timber thereof, and to use the fruits and revenues thereof for themselves.

C. S. WEST.

Sworn & subscribed to before me this 6th day of Dec'r, 1867.

M. HOPKINS,
Clerk U. S. Circuit Court, Austin.

UNITED STATES OF AMERICA,
State and District of Texas:

Know all men by these presents, that we, Squire S. Connett, pl'ff, as principal, and William C. Connett, Geo. W. Paschal, N. S. Rector, Jno. W. Brown, Hancock & West, as sureties, are held and firmly
203 bound to William H. Williams, John H. Williams, Eddie Williams, and Anna C. Williams, def'ts, in the sum of one hundred thousand dollars; for the true performance whereof we bind ourselves, our heirs, executors, and administrators, sealed with our seal this 31st day of August, A. D. 1867.

The condition of the above obligation is such that, whereas the above-bound Squire S. Connett, as pl'ff, is about to sue out a writ of sequestration from the circuit court of the United States for the western district of Texas, at Austin, against the said defendants:

Now, therefore, should the said plaintiff pay to the said defendants all such damages as may be awarded against them, in case it shall be decided that the sequestration was wrongfully sued out, then this obligation to be void; otherwise to remain in full force.

SQUIRE S. CONNETT. [SEAL.]
W'M C. CONNETT. [SEAL.]
GEO. W. PASCHAL. [SEAL.]
N. S. RECTOR. [SEAL.]
JNO. W. BROWN. [SEAL.]
HANCOCK & WEST. [SEAL.]

Approved Dec. 6th, 1867.

MATTHEW HOPKINS, *Clerk.* [SEAL.]

204 Thereupon issued out of the clerk's office at Austin writs of citation to the defendants named in the petition. "Citation to W'm H. Williams" is in words, to wit:

United States circuit court, western district of Texas.

The President of the United States to the marshal of the western district of Texas, greeting:

You are hereby commanded to summon William H. Williams, a resident citizen of the county of Bastrop, western district of Texas, if to be found in your district, to be and appear before the honorable the circuit court of the United States, at a court to be holden in and for the western district of Texas, at the city of Austin, on the first Monday in January next, to answer the petition and complaint of Squire S. Connett, who is a resident citizen of the State of Missouri, and who sues of in an action of tresspass, to try title, & for damages, a copy of the petition being hereto annexed, against William H. Williams, John H. Williams, Eddie Williams, wife of William H. Williams, & Annie C. Williams, wife of John H. Williams, who are all resident citizens of the county of

Bastrop, western district of Texas, and who are sued, of which you will serve the said defendant, William H. Williams, with the
205 accompanying copy of said petition, & copy of this writ.

Witness the Hon. Salomon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at the city of Austin, this 9th day of Dec., A. D. eighteen hundred and sixty-seven, and 91 year of the Independence of the United States of America.

[SEAL.] MATTHEW HOPKINS, *Clerk.*

The endorsements & marshal's return thereon is as follows: No. 1026. Filed Jan'y 3, 1869. M. Hopkins, clerk. In United States circuit court for the western district of Texas, at Austin, holding sessions. Squire S. Connett vs. William H. Williams et als. Citation to Wm. H. Williams, county of Bastrop, iss'd 9 day of Dec., 1867. Matthew Hopkins, clerk.

Received in office 10 day of, executed on the 16th day of Dec., 1867, by handing to the within-named defendant, in person, a true
206 copy of this writ and a copy of the petition attached, both certified to by the clerk of the court under the seal of the court.

A. P. BLOCKER, *U. S. M.*,
By L. H. LUCKETT,
Dep'y U. S. M.

M. m. 32 mi., $1.92; dep'y M., 8 mi., 48; service, 2 00.

HANCOCK & WEST, PASCHAL, O. M. WATKINS, *for Pl'ffs.*

Citations for the other defendants are respectively like the foregoing, and marshal's return thereon as follows:

Citation to John H. Williams. No. 1026. Filed Jan'y 3, 1867. M. Hopkins, clerk. In United States circuit court for the western district of Texas, at Austin, holding sessions. Squire S. Connett vs. William H. Williams et als. Citation to John H. Williams, county of Bastrop, iss'd 9th day of Dec., 1867. Matthew Hopkins, clerk.

Rec'd in office 10 day of, executed on the 16 day of Dec., 1867, by handing to the within-named defendant, in person, a true copy of this writ and a copy of the petition attached, both certified to by the clerk of the court under the seal of the court.

A. P. BLOCKER, *U. S. M.*,
By L. H. LUCKETT, *D'y U. S. M.*

M. m. 32 m., $1.92; d'y's mil. 8, 48; service $2 00.

HANCOCK & WEST, PASCHALS & O. M. WATKINS, *Pl'ff's Att'y.*

207 Citation to Eddie Williams, wife of Wm. H. W.

Endorsement: No. 1026. Filed Jan'y 3, 1867. M. Hopkins, clerk. In United States circuit court for the western district of Texas, at Austin, holding sessions. Squire S. Connett vs. William H. Williams et als., tresspass to try title & for damages. Citation to Eddie Williams, wife of Wm. H., county of Bastrop, iss'd 9th day of Dec., 1867. Matthew Hopkins, clerk.

Rec'd in office 10 day of, & executed the 16th day of Dec., 1867, by handing to the within-named defendant, in person, a true copy of this

writ and a copy of the petition attached, both certified to by the clerk of the court under the seal of the court.

A. P. BLOCKER, *U. S. M.*,
By L. H. LUCKETT, *D'y.*

M. mileage ; d'y mileage ; service, $2.

HANCOCK & WEST, PASCHALS, O. M. WATKINS, *Att'ys for Pl'ff.*

Citation to Anna C. Williams, wife of Jno. H., as follows:

No. 1026. Filed Jan'y 3, 1867. M. Hopkins, clerk. In United States circuit court for the western district of Texas, at Austin, holding sessions. Squire S. Connett vs. William H. Williams et als. Tresspass to try title & for damages. Citation to Anna C. Williams, wife of Jno. H. County of Bastrop. Issued 9 day of Dec., 1867. Matthew Hopkins, clerk.

208 Rec'd in office 10 day of, & executed on the 16th day of Dec., 1867, by handing to the within-named defendant, in person, a true copy of this writ and a copy of the petition attached, both certified to by the clerk of the court under the seal of the court.

A. P. BLOCKER, *U. S. M.*,
By L. H. LUCKETT, *D'y.*

Service, $2.

HANCOCK & WEST, PASCHALS, O. M. WATKINS, *Att'ys for Pl'ff.*

And afterwards, on the same day of the week, month, and year, to wit, on the 9th day of Dec., 1867, writ of sequestration was issued out of this court, which writ is endorsed as follows: No. 1026. In U. S. circuit court western district of Texas, at Austin, holding sessions. Squire S. Connett vs. William H. Williams, tresspass to try title, &c. Writ of sequestration iss'd Dec. 9, 1867. Matthew Hopkins, clerk. Rec'd in office Dec. 10, 1867. Filed June 8, 1868. M. Hopkins, clerk. Hancock & West, Paschals, & O. M. Watkins, pl'ffs att'ys; and the same is in words, to wit:

UNITED STATES OF AMERICA,
County of Travis, West District, State of Texas:

Circuit court of the United States in and for the western district of Texas, at Austin, holding sessions.

209 The President of the United States of America to the marshal of the western district of Texas, greeting:

Whereas Squire S. Connett, a resident citizen of the county of Buchanan, and State of Missouri, hath filed his petition in our said court at Austin, against William H. Williams, John H. Williams, and Eddie Williams, wife of Wm. H. Williams, and Anna C. Williams, wife of the said John H. Williams, of the county of Bastrop, and State of Texas, resident citizen of the said western district of Texas, in an action of trespass, &c., to try title and for damages; and whereas the said Connett alleges that he is the legal owner of all that certain tract of land, in said county of Bastrop, fronting upon the east bank of the Colorado River, about seven miles above the town of Bastrop, and known as the league of land granted to Samuel M. Williams, and described as league No. 4, in and all the appurtenances thereto belonging, consisting of fields, houses, mills, store-house, cotton-gin, still, stables, cabins,

& other improvements thereon, of the value (including rents & profits, and use & occupation) of fifty thousand dollars, of which the said Connett, plaintiff herein, says that the said William H. Williams,
210 and John H. Williams, and Eddie Williams, wife of Wm. H. Williams, and Anna C. Williams, wife of said John H. Williams, (who are made defendants,) with force and arms, broke into his close and entered upon his said land; and from the 1st day of May, A. D. 1867, from thence hitherto have held possession of the same to his damage many thousand dollars, as in his said petition set forth; alleging further, that they have with force and violence cut down and destroyed large amounts of timber, and other wrongs and injuries to said premises have committed, and that he, the said Connett, doth verily fear that they, the defendants aforenamed, will make use of their wrongful possession to injure said property and to waste the fruits and revenues produced by the same and convert them to their own use; and praying therefore that a writ of sequestration may issue in accordance with the statute to take possession of the same by this court, and also praying that they be cited to defend the wrong & injury, if defend they may or can.

And whereas the said Cornett, as principal, and W'm C. Cor-
211 nett, George W. Paschal, N. S. Rector, Jno. W. Brown, and Hancock & West are sureties in the penal sum of one hundred thousand dollars, have filed with the clerk of said court their certain penal bond, binding themselves to make their said plea good, or pay to the said defendants such, damages as may be awarded against them for the wrongful serving out of said sequestration.

And whereas the said Connett, in the State of Missouri, before a commissioner of a circuit court of the United States for the districts of Missouri, and C. S. West, att'y and acting for the plaintiff, S. S. Connett, before the clerk of this court, have made their several affidavits in support of the allegations contained in said petition and in accordance with the statute:

These are therefore to command you to take possession of the property therein and herein described and keep the same, subject to the order of this court, unless the defendants, within thirty days from your levy, shall replevy the same in accordance with the statute.

See ye to it that in all things you follow the law, and return this writ so that your doings may be manifest before or on the return day, Jan'y, 1868.

212 Witness the Hon. Salomon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, at Austin, this 6th day of Dec., A. D. 1867.

[SEAL.] MATTHEW HOPKINS, *Clerk.*

And the marshal's return thereon is as follows:

Came to hand on the 12th day of Dec. 1867, and executed on the 16th day of Dec., 1867, taking possession of the said league of land mentioned in said writ and the appurtenances thereto belonging, viz, fields, houses, mills, store-houses, cotton-gin, still-house, stables, &c., and holding the same as required by said writ.

A. P. BLOCKER,
U. S. Marshal,
By L. H. LUCKETT,
Dep'y U. S. M.

Mar. mil., 32, 1.92; dep'y's do., 8, 48; custody of property from date of ex't'g writ for 30 days, @ $3 p. day, 90; ex't'g & ret'g writ, 2—94.40. 30 days cust. of prop., 108.00, to 19 Feb'y, '68, $202.40.

The period of thirty days mentioned in this writ having elapsed, and the defendants, W'm H. Williams, Jno. H. Williams, & Eddie
213 Williams, wife of W'm H. Williams, and Anna C. Williams, wife of Jno. H. Williams, having failed to replevy the same, and the plaintiffs executing their bond in the sum of one hundred thousand dollars, to wit, Squire S. Cornett, as principal, and Hancock & West, John W. Brown, and N. S. Rector, as sureties, I delivered possession of the said premises to Hancock & West, attorneys for said pl'ff, in pursuance of law, this 19th day of February, A. D. 1868.

A. P. BLOCKER,
U. S. Marshal W. D. Tex.

And on the 17th Dec., 1868, the waiver of right to replevy by def'ts was filed, which is endorsed as follows: 1206. Cornett vs. Williams. Waving of right to replevy by def'ts. Filed Dec. 17, 1868. M. Hopkins, cl'k.

The same is in words, to wit:

S. S. CORNETT
vs.
J. H. & W. H. WILLIAMS. } In U. S. circuit court. Sequestration.

We hereby waive, on behalf of the def's in above cause, their right to replevy the property in this suit within the first thirty days.
Jan'y 8, 1869.

W'M H. WILLIAMS.
JNO. H. WILLIAMS,
Per W'M H. WILLIAMS.

And among the papers of the cause, there appears one which is in words, to wit:

214 *Agreement of H. H. Williams not to replevy.*

Filed Dec. 17, 1868.

M. HOPKINS, *Clk.*

In United States circuit court, at Austin.

S. S. CORNETT
vs.
J. H. & W. H. WILLIAMS. } No. 1026.

We, the undersigned attorneys for Henry H. Williams, who will interplead as landlord in the above stated cause, and claim the land in dispute in his own right, will not replevy the land in controversy.

CHANDLER, TURNER & CARLETON,
Att'ys for H. H. Williams.

And afterwards, on 9th January, 1869, the deposition of W. P. Ballinger was filed and endorsed, to wit: Squire S. Cornett, pl'ff, vs. W'm H. Williams, Jno. H. Williams, Eddie Williams, and Anna C.

Williams, def's. No. 1026. Deposition of W. P. Ballinger. Opened by order of court, January 8, 1868. M. Hopkins, cl'k. Filed
215 Jan'y 6, 1869. M. Hopkins, clerk.

Matthew Hopkins, esq., clerk circuit court of United States, at Austin:

I, E. W. Chandler, County, swear that the within package, containing depositions from Levi Jones, the commissioner before whom the same was taken, and that the same have not been out of my possession since I received the same, and that they have undergone no alteration.

F. W. CHANDLER.

"Sworn to and subscribed before me this 6th Jan'y, 1868.

M. HOPKINS, *Clerk.*

(Across the seal:) "Levi Jones, com'r of the U. S. courts;" and the same is in words, to wit:

Deposition of W. P. Ballinger.

UNITED STATES OF AMERICA,
Eastern District of Texas, at Galveston:

Be it remembered that, on this 2d day of January, A. D. 1868, at the city of Galveston, in the district aforesaid, before me, Levi Jones, clerk of the United States circuit court at Galveston, and ex-officio United States commissioner of affidavits & bails duly appointed by the circuit court of the United States for said eastern district of Texas, personally appeared W. P. Ballinger, of sound mind and lawful age, witness for the defendants in a civil suit now depending in the circuit court
216 of the United States for the western district of Texas, at Austin, wherein Squire S. Cornett is plaintiff, and William H. Williams, John H. Williams, Eddie Williams, & Anna C. Williams, are defendants; and the said witness, being by me first carefully examined and cautioned and duly sworn to testify the whole truth, and nothing but the truth, did thereupon depose and say: I was one of the attorneys for Henry H. Williams in recovering judgement in his favor against Samuel M. Williams, in the district court of the U. S. for this district, at Galveston. The first judgement was rendered June 28, 1850, for $26,736, according to my business register. The second, which was founded upon the first, was rendered July 12, 1858, for $43,936.34, and $18.15 costs, according to my register. I believe my register correct. The possibility as to precise date or amount, there may be an inaccuracy. The records of the court are burnt up. The judgements were in due form, which I state from being familiar with the practice and proceedings in said court. The judgement was not resisted by Sam'l M. Williams, so far as I know or ever had ground to believe. The indebtedness on which said judgement was rendered was bona fide and actually and legally existing. I heard the subject discussed by Henry H. Wil-
217 liams and Sam'l M. Williams together. I was well acquainted, and had business and friendly relations with both of them, and was on confidential terms with Henry H. Williams, as his counsel about his business matters with which I had connection. They were together when H. H. W. handed me the claim for suit to be put in judgement. He represented it as an amount justly due him in their transactions; that he wanted to preserve it, and prevent its being barred by limita-

tion, although it was not his own intention, as expressed at the time, & as he instructed us, to harrass Sam'l M. W. about it. They were brothers, & their relations were affectionate. My information, understanding, and belief were at the time, and have always been, that the indebtedness was genuine & bona fide, and I know no fact which induces any belief to the contrary, tho' my means of information were the statement of the parties themselves, & my opinion of their character, & some general knowledge of their former transactions in business. The records of the U. S. court at this place were removed to Houston, and were burnt up during the war. This is matter of public notoriety. Being asked by O. M. Watkins, esq., to state any fact in my knowledge which will benefit the plaintiff Cornett, I state that I have no knowl-
218 edge of the case or the facts involved in it, &, so far as I know, am not aware of any fact which would benefit plaintiff.

W. P. BALLINGER.

Subscribed & sworn to before me this 2nd day of January, 1868.

LEVI JONES,
Clk E. D. T. and Ex-off. U. S. Comm'r.

And I, the said Levi Jones, do certify that the reason for taking the foregoing deposition of the said witness, W. P. Ballinger, is that the same is necessary for the defendants in the said civil suit, in the caption mentioned, and that the said witness lives in Galveston, State of Texas, more than one hundred miles from Austin, the place of trial of said civil suit.

I further certify that a notification to be present at the taking of said deposition, and put interrogatories if he should think fit, on the same day of the taking thereof, was given to O. M. Watkins, esq'r', whose name appears as one of pl'ff's att'y to the petition, but no notification was given to the plaintiff, or any other attorney for said pl'ff, neither the said adverse partie', nor any attorney of his, except said Watkins, residing or being within one hundred miles of Galveston aforesaid, at the time of taking said deposition.

219 I further certify that, on the date hereof, I was attended by the said witness at the city of Galveston aforesaid; that the said witness was first carefully examined and cautioned and duly sworn by me to testify the whole truth; and that the preceding deposition of said witness, W. P. Ballinger, was reduced to writing by said W. P. Ballinger in my presence, and, after being carefully read over to and approved by said witness, he subscribed the same in my presence, as the same appears, and I have retained the said deposition in my possession, without alteration, for the purpose of sealing up and directing the same with this certificate of the reasons aforesaid for taking said deposition, with my own hand, to the court for which the same was taken.

I further certify that I am not of counsel or attorney to any one of the parties in said civil suit, or in any way interested in the event thereof.

I further certify that the said O. M. Watkins, in pursuance of my notification to him, attended & was present at the taking of said deposition, and propounded an interrogatory to said witness as therein appears.

Given under my hand at the city of Galveston this 2nd day of January, A. D. 1869.

LEVI JONES,
Clerk E. D. Texas, & Ex-offi. Comm'r of said Court.

220 And afterwards, to wit, on 9th day of June, 1868, the following entry appears upon the minutes of the court:

SQUIRE S. CORNETT
vs.
W'M H. WILLIAMS ET AL. } No. 1026.

On this day came the plaintiff, by the attorneys, Hancock and West, and G. W. Paschal; and the def'ts, although duly served with process, failing to appear, plead, or answer to plaintiff's petition, either in person or by attorney, on motion of pl'ffs, judgment by default was entered against them, and writ of enquiry awarded to be executed on some future day.

And afterwards, to wit, on the 19th day of June, A. D. 1868, the following entry appears upon the minutes of the court:

SQUIRE S. CORNETT
vs.
W'M H. WILLIAMS ET AL. } No. 1026.

In the foregoing entitled and numbered cause, at a previous day of the present term of this court, to wit, on the 9th inst., this cause being regularly reached on the docket, and called for trial, and the said def'ts W'm H. Williams, John H. Williams, and Eddie Williams, wife of W'm H. Williams, and Anna C. Williams, wife of Jno. H. Williams, having been duly served with process, and failing to appear and plead,
221 or demurr, judgment by default was rendered against said def'ts, and a writ of enquiry awarded; and now, on this day, came on to be heard the above-entitled cause upon the writ of enquiry heretofore awarded as aforesaid, and thereupon came a jury of good and lawful men, to wit, John Stelfox and eleven others, who, being duly empanelled and sworn, returned the verdict, to wit:

"We, the jury, find for the plaintiff the land & improvements and five dollars damages in case No. 1026.

"JNO. STELFOX, *Foreman.*"

It is therefore ordered and adjudged by the court, that said plaintiff, Squire S. Cornett, have and recover of and from said defendants W'm H. Williams, John H. Williams, Eddie Williams, and Anna C. Williams, the league of land with the improvements sued for, which said league of land is described as follows: All that certain tract of land in said county of Bastrop, fronting upon the east bank of the Colorado river, about seven miles above the town of Bastrop, known as the league of land granted to Sam'l M. Williams, and described as league No. 4.

And it furthur appearing to the court that said plaintiff caused
222 a writ of sequestration to issue on the 9th day of Dec'r, 1867, and that by virtue of said writ the marshal took possession of said land and improvements above described, and that the said def'ts or any of their agents or attorneys failed to replevy said property within the time prescribed by law, and that upon the failure of said defendants to replevy, that the said plaintiff did, on the 19th day of Feb'y, A. D. 1868, replevy said lands and improvements by giving the bond required by law, and thereupon the marshal delivered the possession of said league of land and the improvements to Squire S. Cornett, the said plaintiff:

It is therefore further ordered and adjudged by the court that the said plaintiff keep, retain, and enjoy possession of said league of land, and all the improvements against any persons whomsoever; and that a writ of possession issue against said defendants to dispossess them, or any of them, or any of their agents or att'ys, or any other person claiming under them of said league of land and improvements, or any part or portion of the same, that they, or either of them, may have in possession.

223 And it is further ordered and adjudged by the court that the said plaintiff have and recover of, and from, the said defendants the said sum of five dollars for his damages so found by the verdict of the jury, together with all his costs in this behalf laid out and expended, and for which execution may issue.

And it was proved that the waiver of the right to replevy was signed by the attorneys of H. H. Williams on the 8th or 9th of Jan'y, 1868. It was further proved by Geo. W. Paschal that the plaintiff had notice of this sequestration suit, and retained Messrs. Chandler & Turner, and sent them a draft for their fee in this sequestration case; and it was also proved by J. H. Williams, whose depositions are made a part of def'ts' bill of exceptions, No. 6, that he was one of the def'ts in said suit of sequestration; and that he was at the time under a power of attorney, the general agent of his father, H. H. Williams, in Texas, and that, when said suit was brought, he and the other defendant,

224 W. H. Williams, were tenants of H. H. Williams, and held land under him, and that he, J. H. Williams, as agent for his father, consulted Messrs. Chandler & Turner, as attorneys at law, as to the defense of said suit. It was further proved that Mr. F. W. Chandler, of the law firm of Chandler & Turner, was consulted as to the said sequestration suit by H. H. Williams, and that they examined into the matter and deemed it best for his interest for him not to appear as landlord, and not to conduct the defense, and that they therefore did not do so, and did not appear for either H. H. Williams, or J. H. Williams, and W. H. Williams, on the trial. It was also proved that the attorney, F. W. Chandler, was present at the trial of the suit of Cornett vs. Williams, being the sequestration suit, and was examined by the pl'ff, as a witness, on the *the* trial, and it was proved the present suit was filed in April, 1868. It was proved that F. W. Chandler stated, also, to Cornett's att'ys, in the sequestration suit, before & at the trial of that suit, he did not & would not appear either for the def'ts or for H. H. Williams, on the trial of that cause.

And under these facts the defendants asked the court to charge the jury as follows:

225 Fourth instructions, asked by the defendants in words, to wit:

If, however, the jury believe from the evidence that the plaintiff, H. H. Williams, had actual notice of the sequestration suit *suit* of Cornett vs. J. H. & W. H. Williams, and employed co'nsel and had opportunities to appear and defend, and failed to do so, then the judgment in that cause is as binding on him as if he had been a party to the record.

HANCOCK AND WEST,
Attorneys for Def'ts.

Which the court refused to give in words, to wit:
"Disallowed and explained, as appears by the charge delivered."

The def'ts then asked the court to give this further instruction on the subject, in words, to wit:

If the jury believe that, at the time the plaintiff alleges the trespass to have occurred, and at the time the suit was filed, the land was in the custody of the law, and that the defendants entered under the authority of the court, and were then holding subject to the judgment
226 of the court when this suit was brought, then you will find for the defendants.

HANCOCK AND WEST,
Attorneys for the Def'ts.

Which the court declined to give in words, to wit:

"Disallowed because the facts do not authorize such a charge. Connett had replevied the lands in Feb'y. This suit was not brought till the 29th of April, 1868;" but of its motion charged the jury thus:

"4. Having thus obtained the title of W. H. and J. H. Williams to the land, Cornett, in December, 1867, brought a suit against them and their wives for recovering possession thereof, and had the land sequestrated, and, on the 19th day of Feb'y, 1868, Cornett replevied the land and thus obtained possession thereof. On the 18th of June, 1868, he recovered judgment against the defendants in the action."

"It is claimed by the defendants that the plaintiff, Henry H. Williams, is concluded by this sequestration suit because the defendants were tenants under him and one of them was his general agent in Texas. But I instruct you he is not concluded. He was no party to the suit and did not undertake the defense of it. A landlord may if he
227 chooses come in and defend an action brought against his tenant for the land. But he is not bound to do it. The tenant may be under such complications that the landlord's defense would be prejudiced thereby. The landlord, if he prefers, may await the event of the action, and, if this tenant is ousted, may then bring his own action as has been done here and try his title on its own merits, unembarrassed by the peculiar complications in which his tenants may have been involved."

To all which action of the court, both in refusing the two instructions asked by the defendants as above set forth and in giving of its own motion the charge above set forth, the deft's at the time excepted and asked leave to prepare their bill, and, the same being now prepared, they here in open court tender this their fourth bill of exceptions and ask that the same may be signed, sealed, and made a part of the record, which is accordingly done.

JO'S P. BRADLEY, [SEAL.]
Ass't Justice Sup. Ct. U. S.

228 The fifth bill of exceptions is endorsed, to wit: "No. 1054. In U. S. circuit court western district of Texas, at Austin, June term, 1872. Law side. H. H. Williams vs. J. D. Nash et als. Def't's fifth bill of exception. Filed June 13, 1872. M. Hopkins, clerk." And the same is in words, as follows:

Defendants' 5th bill of exceptions.

In U. S. circuit court for the western district of Texas, at Austin. Law side. June term, '72.

H. H. WILLIAMS, PL'FF,
vs.
J. D. NASH ET ALS., DEF'T'S. } 1054.

Be it remembered that, on the trial of the above-entitled cause, after

the defendants had read the following deeds, judgements, executions, etc.:

I. Deed from R. A. Smith, assignee in bankruptcy, to S. S. Cornett, for the land in controversy, to wit:

The same is endorsed as follows: "R. A. Smith, assig., to S. S. Connett. Deed." And the same is in words, to wit:

Deed of R. A. Smith, assignee in b'k'pt'y, to S. S. Connett.

[50-c't int. rev. stamp; 1.00 U. S. I. rev. stamp.]

STATE OF TEXAS, *Travis County:*

Know all men by these presents that, whereas, I, R. A. Smith, was duly elected assignee of the estate of W. H. & J. H. Williams, bankrupts, by a majority of the creditors of said estate, on the 4th day of
229 January, A. D. 1868, in compliance with the provisions of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, said parties having been adjudged bankrupts by the Hon. Tho's H. Duval, judge of the United States district court for the western district of Texas, on, to wit, the seventh day of October, A. D. 1867, and whereas the said W. H. Williams is indebted to one Squire S. Connett, in the sum of twelve hundred & two $\frac{50}{100}$ dollars, being the balance due on two notes made, executed, and delivered by said W. H. Williams to one Wesley Puryear, on, to wit, the 24th day of June, A. D. 1861, and due, respectively, on the 1st day of January, and 23*th* day of December, A. D. 1862, which said notes were assigned to the said Squire S. Connett for a valuable consideration; and whereas the said W. H. Williams, the better to secure the payment of said notes on same day, to wit, the 24th day of June, A. D. 1861, made, executed and delivered to one J. R. Nichols, as trustee, a deed of trust on a certain parcel or tract of land lying and being situated on the Colorado River, eight miles above the town of Bastrop, in Bastrop County, and known as league No. 4, and originally granted to S. M. Williams, which deed of trust was assigned with said notes to the said Connett;
230 and whereas, as the said Connett has proved up his claim against the estate of said Williams, in bankruptcy, and has proposed to me as assignee of said estate to ascertain by agreement, in accordance with the 20th section of the aforesaid act of Congress, the value of said W. H. Williams' interest in said league of land, and that said interest in said land shall be held to be, for all the purposes of this agreement, the said balance due on the said notes, with the interest that has accrued on the same, to wit, twelve hundred two $\frac{50}{100}$ dollars: Now, therefore, in consideration of the premises, and for and in consideration of the surrender by the said Connett of the said notes and the said deed of trust to me assigned as aforesaid, the receipt of which notes and deed of trust is hereby fully acknowledged and confessed, I have granted, bargained, sold, conveyed, and released, and I do hereby grant, bargain, sell, and convey, and release unto the said Squire S. Connett, his heirs and assigns, all the right, title, and interest of the said W. H. Williams, in and to the said above-described land:

To have and to hold all and singular the land and premises hereinbefore described, with all and singular the rights, members, hereditaments and appurtenances to the same belonging, to the said Squire S.
231 Connett, his heirs and assigns forever.

Witness my hand and seal, (using scroll for seal,) this the 2nd day of June, A. D. 1868.

R. A. SMITH, [SEAL.]
Assignee of the Estate of W. H. & J. H. Williams.

Test: C. S. WEST.
JOHN B. COSTA.

STATE OF TEXAS, *County of Travis:*

Before me, L. W. Collins, notary public, Travis Co., personally appeared R. A. Smith, to me well known, who acknowledged that he signed the above & foregoing deed, for all the uses, purposes, and considerations therein stated.

In testimony whereof I hereunto set my hand and affix the seal of my office, this 3d day of June, A. D. 1868.

[L. S.] L. W. COLLINS,
Notary Public T. Co.

II. Deed of trust from W. H. Williams to Wesley Puryear, which is endorsed as follows: "William H. Williams to Wesley Puryear. Trust-deed. File, No. 509. Filed for record at 2 o'clock p. m., January 14th, 1864. W. A. Highsmith, cl'k C. C. B. Co." And same is in words as follows:

This deed made & entered into this 24th day of June, 1861, between W. H. Williams, of the first part, and J. R. Nichols, of the second
232 part, & Wesley Puryear, of the third part, witnesseth: That, whereas said W. H. Williams, of Bastrop County, is indebted to said Puryear, of s'd county, in the sum of twenty-four hundred dollars, evidenced by said Williams, two several notes of even date herewith, the one for six hundred dollars, payable 1st January, 1862, and the other for eighteen hundred dollars, payable 25 December, 1862, both bearing interest at rate of 10 % *per cent.* per annum from date; and said Williams, being desirous of securing the faithful payment of said sums of money to said Puryear, his heirs, &c., has, for & in the consideration of the premises, & for one dollar to him in hand paid by said Nichols, bargained & sold, given & granted, and he, said Williams, doth hereby bargain, sell, give, grant, release, assign, & convey unto s'd J. R. Nichols, his heirs & executors, a certain tract of land lying in Bastrop Co., known as league No. 4, eight miles above the town of Bastrop, on the Colorado River—the original grantor being Sam. M. Williams: to have & to hold the said league of land with its appurtenances, to him, the said Nichols, his heirs and assigns, in trust, nevertheless, that if the said W. H. Williams, his heirs, &c., shall fail to pay the said six hundred dollars, or said eighteen hundred dollars, when and as each of said sums fall due, as per tenor of said notes to said Puryear,
233 his heirs or assigns, then, and on either such failure, it shall be lawful & the duty of said J. R. Nichols, at request of said Puryear, his heirs or assigns, after advertising the time & place of sale in some newspaper published in Austin City, & at one or more public places in Bastrop Co. for thirty days, to sell the said league of land herein conveyed, together with all and singular its appurtenances, to the highest bidder, for so much in cash as may be necessary to pay and discharge whatever may be due & payable on either or both of said notes to said Puryear, and the cost attending the execution of this trust, and bal. on a credit of one & two years; and out of cash rec'd pay to said Puryear, or his as-

signs, whatever may be due on either of said notes; and, if sale be made before the $1,800 note falls due, so much of the purchase-money to be on a credit corresponding with the *terms* said note falls due, and said Nichols, on making such sale, after receiving the cash, & taking notes for the credit payments, to execute and deliver to the purchaser a sufficient deed in fee to said league of land, taking a trust-deed to secure the deferred payments, & after satisfying the said two notes due s'd Puryear, to transfer the balance to said Williams. But if
234 said Williams shall well and truly pay off and discharge s'd two notes due s'd Puryear, when and as they fall due, then this deed to be void, or else to remain in full force; and said W. H. Williams will forever warrant & defend the right & title of the said J. R. Nichols, his heirs & assigns, in the said league of land, with its appurtenances, free from the claims of all persons whatever.

Witness the parties' hands & scroll-seals this day & year first above written.

W'M H. WILLIAMS. [SEAL.]
J. R. NICHOLS. [SEAL.]
WESLEY PURYEAR. [SEAL.]

RO. C. BROWN attest signatures of W. H. Williams & Wesley Puryear.
A. DUMARS.

STATE OF TEXAS,
County of Bastrop:

Before me, clerk of the county court of Bastrop Co., in said State, duly commissioned and qualified, on this day personally appeared A. Dumars, one of the subscribing witnesses to the instrument of writing hereto attatched, to me made known, who, being by me duly sworn, deposeth & saith that W'm H. Williams, whose name appears to said instrument of writing, dated the 24th day of June, 1861, acknowl-
235 edged in his presence that he has subscribed, sealed, and executed the same, for the uses, purposes and considerations therein stated, and that he had signed the same, as witness, at the request of said W'm H. Williams.

In testimony whereof I hereunto set my hand and affix the seal of the court of said county, at the city of Bastrop, this 25th day of June, A. D. 1861.

[L. S.] W. A. HIGHSMITH, *Clk.*
Per H. W. BROWN,
Clerk County C't B. Co.

THE STATE OF TEXAS,
County of Bastrop:

I, W. A. Highsmith, county clerk of said county, certify that the foregoing deed, together with certificate of authentication, was, at 2 o'clock p. m., Jan'y 14, 1864, filed in my office, & was, at 11 o'clock a. m., January 21st, 1864, correctly recorded in book letter M, pages 557 & 558 of deed records.

To certify all which I have set my hand & seal of office on the day & date above named.

W. A. HIGHSMITH, *Clerk.*

III. Judgement 9th Feb'y, 1867; suit on note of S. S. Cornett,
236 viz: J. H. & W. H. Williams:

SATURDAY MORNING, *Feb'y 9th*, 1869.

SQUIRE S. CONNETT
vs.
J. H. & W. H. WILLIAMS. } 836.

And now come the parties, by their respective att'ys—the plaintiff, by Hancock & West, and the defendants, by G. W. Jones—and the court being now sufficiently advised, is of the opinion that the law is with the plaintiff. The demurrer of pl'ff's to defendants' special plea is therefore sustained by the court; to which ruling of the court the defendants then & there excepted, and thereupon the defendants moved the court for leave to amend; and, the amended plea having been filed, the plaintiff's demurrer to the same was filed and sustained by the court; to which ruling the defendants then & there in open court excepted.

And now came a jury of twelve good and lawful men, of the western district of Texas, duly empannelled and sworn, to wit: A. H. Barnes, A. H. Cox, John H. Walker, D. P. Kinney, T. Bostwick, F. E. Foster, J. H. Herndon, E. Rawen, L. B. Collins, P. Humphries, J. W. Reid, W. D. Scott, and thereupon the plaintiffs offered to introduce in evidence the note sued upon and in pl'ff's petition described; to which the defendants, by their attorney, objected—1st, because the petition did not allege that the same was, at the time of execution, stamped,
237 as required by law, or subsequent thereto; 2nd, because the note was stamped after the institution of the suit by R. N. Lane, collector, on the 11th day of January, 1867; but the court overruled the defendants' objection, and permitted the same to go to the jury; to which ruling of the court the defendants excepted, and having tendered their bill of exceptions, they were signed, and sealed, and made a part of the record.

And now, the jury having heard the evidence, and received the charge of the court, retired and returned into court the following verdict:

"We the jury find for plaintiffs in the sum of 12,584.00 dollars, being principal and interest, in case No. 836.

"J. H. HERNDON, *Foreman.*"

It is therefore ordered, adjudged, and decreed by the court, that the plaintiff, Squire S. Connett, do have and recover of the defendants, William H. Williams and John H. Williams, the sum of twelve thousand five hundred and eighty-four dollars, his damages as aforesaid assessed by the jury, together with all his costs in this behalf in and about this suit expended, to be taxed, and for which execution may issue.

IV. Execution issued on above judgement levied on the land in controversy.

238 The same is endorsed as follows: "No. 836. Bastrop. United States circuit court, western district of Texas. Squire S. Cornett vs. John H. Williams & William H. Williams. Execution. Feb'y 9, 1867. Judgement, $12,584.00. Costs, 54.25. Interest at 10%. Issued 11th day March, 1867. Matthew Hopkins, clerk. Received in office 12 day of March, A. D. 1867, at 5 o'clock p. m. A. P. Blocker, U. S. marshal, by George C. Rives, deputy. J. A. & G. W. Paschal, Hancock & West, att'ys."

The marshal's return is as follows:

"Came to hand the 12th day of March, A. D. 1867, and levied on the 29 March on the following property: One league of land known as league No. 4, on Colorado River, in the county of Bastrop, originally granted to Sam'l M. Williams.

"A. P. BLOCKER, *U. S. Marshal.*
"By GEORGE C. RIVES, *Deputy.*"

And the same is in words as follows:

United States circuit court, western district of Texas.

The President of the United States to the marshal of the western district of Texas, greeting:

Whereas S. S. Connett, of the State of Missouri, on the 9th day of Feb'ry, in the year of our Lord one thousand eight hundred and sixty-seven, at our circuit court of the United States in and for the western district of Texas, hath recorded against William H. Williams and
239 John H. Williams, of the county of Bastrop, the sum of twelve thousand five hundred and eighty-four dollars, with interest at the rate of ten per centum per annum until paid, for debt, and the further sum of fifty-four $\frac{25}{100}$ dollars, costs, and which to the said S. S. Connett is now adjudged:

These are, therefore, to command you that, of the goods, chattels, and estates of the said William H. Williams and John H. Williams, you cause to be made the full amount of this execution, together with legal fees and commissions for collecting the aforesaid amount, and that you have there this writ, at the clerk's office of said court, on the return-day thereof, certifying how you have executed the same.

Witness the honorable Salomon P. Chase, Chief Justice of the Supreme Court of the United States and the seal of court, at Austin, this 11th day of March, A. D. 1867, and the 90th year of the Independance of the United States.

[L. S.] MATTHEW HOPKINS, *Clerk.*

SQUIRE S. CONNETT
vs.
JOHN H. WILLIAMS & W'M H. WILLIAMS. } No. 836. Bastrop Co.

By virtue of an execution in this case, issued on the 11th day
240 of March, 1867, & of a levy made on the 29th day of March, 1867, & endorsed upon the execution, I did advertise according to law, & sell in front of the court-house door in the town of Bastrop, on the 7th day of March, 1867, between the legal hours of sale, the land described in said levy, to Squire S. Connett, the highest & best bidder, for the sum of $176.55, & made deed to the same.

No other property found upon which this execution could be levied. Therefore it is returned not satisfied as to the balance due upon this execution, (after deducting the sum of $176.55, collected for the sale of the land as stated above.)

A. P. BLOCKER, *U. S. M.*
By L. H. LUCKETT, *Deputy.*

4,428 acres, @ 4$\frac{1}{8}$ c'ts per acre, $176.55.

V. Deed of marshal to S. S. Connett is endorsed as follows:

"Marshal's deed, real estate, made 18th day of May, 1867, to S. S. Connett. Filed for record in my office, at 12 o'clock m., the 24th day of July, 1867. Jno. M. Claiborne, C. C. C. B. Co. Fee $2.00. U. S. C." And the same is in words to wit:

THE STATE OF TEXAS, *County of* :

Know all men by these presents that, whereas, by virtue of a certain execution issued out of the circuit court of the United States for the western district of Texas, in favor of Squire S. Connett vs. John
241 H. Williams & William H. Williams, on a certain judgement rendered on the 9th day of February, A. D. 1867; and directed and delivered to me as United States marshal for the western district of Texas, commanding me, of the goods, and chattels, and estate of the John H. Williams & William H. Williams, to make certain moneys in said writ specified, I, Abner P. Blocker, United States marshal as aforesaid, did, upon the 29th day of March, A. D. 1867, levy and seize all the estate, right, title, and interest which the said defendants, on the 9th day of February, 1867, so had of and to the premises hereinafter described; and, on the first Tuesday of May, 1867, within the hours prescribed by law, sold said premises at public vendue, in the county of Bastrop, at the door of the court-house thereof, having first given public notice of the time and place of such sale by causing an advertisement thereof to be posted up at three public places in the county aforesaid, one of which was the court-house of said county, for twenty days previous to said sale; and whereas, at said sale the said premises were struck off to Squire S. Connett, for the sum of one hundred and seventy-six $\frac{55}{100}$ dollars, he being the highest bidder therefor, and that being the highest sum bid for the same, now, therefore, in consideration of the premises aforesaid, and the payment of the said sum of one hundred and seventy-six $\frac{55}{100}$ dollars, the receipt of which is hereby ac-
242 knowledged, I, Abner P. Blocker, United States marshal as aforesaid, have sold, and by these presents do grant and convey unto the said Connett, all the estate, right, title, and interest which the said John H. Williams & William H. Williams had, on the 9th day of February, A. D. 1867, or at any time afterwards, of, in, and to the following-described premises, viz: One league of land known as league No. 4, on the Colorado River in the county of Bastrop, originally granted to Sam'l M. Williams: To have & to hold the above-described premises unto the said Cornett, his heirs, and assigns forever, as fully and as absolutely as I, Abner P. Blocker, as marshal aforesaid, can convey, by virtue of the said writ of execution.

In testimony whereof I have hereunto set my hand this 18 day of May, A. D. 1867.

A. P. BLOCKER,
U. S. Marshal, W. D. Texas.
By L. H. LUCKETT, *D'p'y.*

STATE OF TEXAS, *County of Travis:*

Before me, J. G. Wheeler, clerk of the county court of Travis Co., this day personally appeared L. A. Luckett, to me well known, and acknowledged that he executed and signed the foregoing deed on the reverse hereof, and that the same is his act and deed for all the uses, purposes, and considerations therein stated.

243 In testimony whereof I hereunto set my hand and affix the

seal of the county court of Travis County, at my office in Austin City, this the 20th day of May, A. D. 1867.

[L. S.] J. G. WHEELER,
Clerk C. C. C. T. Co.

THE STATE OF TEXAS,
County of Bastrop:

I, Jno. M. Claiborne, clerk of the county court of Bastrop County, do hereby certify that the foregoing or within deed of conveyance, (with certificate of authentication thereto attached, was filed for record in my office, at 12 o'clock m. Tuesday, the 24th day of July, A. D. 1867, and recorded in book letter N, on page 502 of record of deeds, &c., for said county, at 12 o'clock m. Tuesday, the 24th day of July, A. D. 1867.

In testimony whereof I hereto sign my name and affix the seal of said court, at office in the town of Bastrop, this the 24th day of July, A. D. 1867.

[L. S.] JNO. M. CLAIBORNE,
Clerk C. C. Bastrop Co., Tex.

[50 c. I. R. stamp. 50 c. I. R. stamp.]

VI. Deed from Caroline L. Williams to W. H. Williams. The same is endorsed as follows:

244 "Deed. File No. 383. Caroline L. Williams. To H. H. Williams. Filed for record at 3 o'clock p. m. November 27th, A. D. 1862. W. A. Highsmith, Co. cl'k B. Co." And the same is in words to wit:

STATE OF TEXAS, *County of Bastrop:*

Know all men by these presents that I, Caroline L. Williams, of Galveston County, and one of the four heirs of the late Samuel M. Williams, of said Galveston County, for and in consideration of the sum of ten thousand dollars, to me in hand paid by William H. Williams, of Bostrop County, have & by these presents do grant, bargain, sell, and convey unto the said William H. Williams, his heirs, and assigns forever, all my undivided one-fourth part & interest as one of the said four of the said Samuel Williams' heirs, in and to a certain league or parcel of land situated on the east bank of the Colorado River, in the county of Bastrop, and State of Texas, about eight miles north of the town of Bastrop, originally granted to Samuel M. Williams, and known as league number four of said Bastrop County:

To have and to hold all and singular the premises aforesaid, with the appurtenances and hereditaments thereto belonging, unto the said William H. Williams, his heirs, and assigns forever.

Witness my hand at Bastrop this 15th day of October, A. D. 1862.

CAROLINE L. WILLIAMS.

245 THE STATE OF TEXAS,
County of Bastrop:

And now, on this day, personally comes before me, John O. Snelling, chief justice of Bastrop County, and State aforesaid, Miss Caroline L. Williams, whose name appears to the foregoing deed of conveyance, who acknowledges that she executed the foregoing deed of conveyance for all the purposes and considerations therein expressed, and that she wishes not to retract it.

To certify which I hereunto sign my proper name and affix the seal

of the county court of Bastrop Co., at my office in Bastrop, this 16th day of October, A. D. 1862.

[L. S.] J. O. SNELLING,
Chief Justice B. Co.

THE STATE OF TEXAS,
County of Bastrop:

In evidence that the foregoing deed & certificate of authentication was, at 3 o'clock p. m., November 27, 1862, filed in my office for record, and was, at 11 o'clock a. m., Dec'r , 1862, correctly recorded in the county clerk's office, in book letter "M," deed records, page 406, I have hereunto set my hand & seal of office day & date above written.

[L. S.] W. A. HIGHSMITH,
Co. Clk B. Co.

[4 two $\frac{50}{100}$ dollars stamps.]

246 VII. Deed from Mary D. League & husband to W. H. Williams. The same is in words to wit:

THE STATE OF TEXAS:

Know all men by these presents that I, Mary D. League, wife of T. J. League, of Galveston County, and one of the four heirs of the late Samuel M. Williams, of said county, for and in consideration of the sum of ten thousand dollars, to me in hand paid by William H. Williams, of Bastrop County, his heirs and assigns forever, all my undivided one-fourth interest in a certain league of land situated in Bastrop County, on the east bank of the Colorado River, about eight miles north of the town of Bastrop, originally granted to Samuel M. Williams, and known as league number four of said Bastrop County:

To have and to hold the premises aforesaid, with the improvements thereon and the hereditaments and the appurtenances to the same belonging, unto the said William H. Williams, his heirs, and assigns forever.

(The word "four" interlined.)

Witness my hand at Galveston this the 29th day of September, A. D. 1862.

MARY D. LEAGUE.

I consent to the foregoing.

T. J. LEAGUE.

247 THE STATE OF TEXAS,
County of Bastrop:

Before me, Oscar Farish, clerk of the county court of Galveston County, this day appeared Tho's J. League and Mary D. League, his wife, both to me known, and acknowledged the within instrument of writing to be their respective act and deed, for the consideration and purposes therein stated. And then again the said Mary D., in private examination, separate and apart from her husband, after I had explained to her its nature & character, she acknowledged that said within instrument of writing to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand & the seal of said county court this the 30th day of September, 1862.

OSCAR FARISH, *Clk.*

I hereby certify that the foregoing is a true copy of the original filed for record at 3 o'clock p. m., November 27th, 1862.

W. A. HIGHSMITH,
Co. Clk B. Co..

THE STATE OF TEXAS,
County of Bastrop:

I, W. A. Highsmith, deputy for Joseph A. Glover, clerk of the
248 county court of said county, certify that the foregoing is a true copy of the original deed & certificates of authentication as it appears of record in book letter "N," page 407, of deed records.

In testimony whereof I have set my hand & seal of office this the 28th day of Jan'y, A. D. 1868.

[SEAL.] W. A. HIGHSMITH, *Deputy.*
For JOSEPH GLOVER,
Clk C. C. Co.

VIII. Deed from Austin M. Williams to W. H. Williams is endorsed as follows:

"File No. 382. Deed. Austin M. Williams to W. H. Williams. Filed for record at 3 o'clock p. m., November 27th, A. D. 1862. W. A. Highsmith, co. cl'k B. Co." And the same is in words to wit:

STATE OF TEXAS,
County of Bastrop:

Know all men by these presents that I, Austin M. Williams, of Galveston Co., and one of four heirs of the late Samuel M. Williams, of said county, for and in consideration of the sum of ten thousand dollars, to me in hand paid by William H. Williams, of Bastrop County, have,
249 and by these presents do grant, bargain, sell, & convey unto the said William H. Williams, his heirs and assigns forever, all my undivided one-fourth interest as one of the heirs of the said Samuel M. Williams, in and to a certain league of land, situated on the east bank of the Colorado River, in the county of Bastrop, and State of Texas, about eight miles north of the town of Bastrop, originally granted to Samuel M. Williams, and known as league number four of Bastrop County: To have & to hold all and singular the premises aforesaid, with the improvements & machinery thereon situated, and the hereditaments and appurtenances thereunto belonging, unto the said William H. Williams, his heirs & assigns forever.

Witness my hand at Galveston this thirtieth day of September, A. D. 1862.

A. M. WILLIAMS.

Witness:
JNO. H. WILLIAMS.
HENRIETTA C. ADAMS.

THE STATE OF TEXAS,
County of Galveston:

Before me, Oscar Farish, clerk of the county court of Galveston County, this day appeared John H. Williams, to me known, who, being sworn, says that A. M. Williams signed & executed the within instrument of writing in his presence, and that he, at the request of the
250 said A. M. Williams, signed his name as a witness thereto.

Given under my hand & the seal of said county court, this the 30th day of September, A. D. 1862.

[L. S.] OSCAR FARISH, *Clk.*

In evidence that the foregoing deed & certificate of authentication was, at 3 o'clock p. m., Nov'r 29th, 1862, filed for record in my office, & at 10 o'clock a. m., Dec'r 1st, 1862, correctly recorded in my office in book letter "M," deed records, page 405, I have hereunto set my hand & seal of office, day & date aforesaid.

W. A. HIGHSMITH,
Co. Clk B. Co.

IX. Deed from W. H. Williams and wife to Jno. H. Williams:

The same is endorsed as follows: "File No. 385. W'm H. Williams & wife. 303. Deed. Jno. H. Williams. Filed for record at 9 o'clock a. m., Nov'r 29, 1862. W. A. Highsmith, co. cl'k B. Co." And the same is in words as follows, to wit:

STATE OF TEXAS,
County of Bastrop:

Know all men by these presents that we, William H. Williams,
251 of Bastrop County, and Eddie Williams, wife of said William H. Williams, for and in consideration of the sum of twenty thousand dollars to us in hand paid by Jno. H. Williams, of Galveston County, have, and by these present do grant, bargain, sell, and convey unto the said Jno. H. Williams, his heirs and assigns forever, an undivided one-half interest in and to a certain league of land, situated on the east bank of the Colorado River, in the county of Bastrop and State of Texas, about eight miles north of the town of Bastrop, originally granted to Samuel M. Williams, and known as league number four, of Bastrop County:

To have and to hold all and singular the premises aforesaid, with the improvements and machinery thereon situated, and the hereditaments and appurtenances thereunto belonging unto the said Jno. H. Williams, his heirs and assigns forever.

Witness our hands at Bastrop this twenty-eighth day of November, A. D. 1862.

W'M H. WILLIAMS.
EDDIE E. WILLIAMS.

STATE OF TEXAS,
County of Bastrop:

Before the undersigned, clerk of the county court of said county,
252 personally appeared W'm H. Williams and Eddie E. Williams, his wife, to me well known to be the individuals described in and who executed the above and foregoing conveyance, and they acknowledged to me that they executed the same for the uses, purposes, and considerations therein stated, and that the same is their act and deed. And the said Eddie E. Williams, wife of the said W'm H. Williams, having been examined by me privily and apart from her said husband, and having the said deed fully explained to her, she, the said Eddie E. Williams, acknowledged the same to be her act and deed, and declared that she had willingly sealed and delivered the same, and that she wished not to retract it.

In testimony whereof I hereunto set my hand and affix the seal of the court of said county, at the city of Bastrop, this 28th day of November, A. D. 1862.

[L. S.]

W. A. HIGHSMITH,
Clk C. Co. B. Co.

[8 $2\frac{50}{100}$ dollars I. R. stamps, cancelled.]

In evidence that the within deed & certificate of authentication was, at 9 o'clock a. m., Nov'r 28, 1862, filed for record, and was, at 4
253 o'clock p. m., Dec'r 1st, 1862, correctly recorded in book "M," deed records, page 408, I have set my hand & seal of office, day above written.

W. A. HIGHSMITH,
Co. Clk B. Co.

X. Trust-deed from W. H. and J. H. Williams, and wives, to Isaac Wildbahn:

(Indorsed:) Filed for record at 2 o'clock p. m., Feb'y 6th, 1864. W. A. Highsmith, cl'k C. C. B. Co.

The same is in words, to wit:

THE STATE OF TEXAS,
County of Texas:

This indenture, made this first day of January, A. D. 1864, between W'm H. Williams & Eddie Williams, his wife, and John H. Williams and Anna C. Williams, his wife, of the first part, and Isaac Wildbahn, of the second part, witnesseth: That, for and in consideration of the sum of five dollars to us in hand paid, and of the consideration hereinafter expressed, the said parties of the first part have granted, bargained, and sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, the following described lands, namely, known as league number four, (4,) in the county of Bastrop, on the east bank of Colorado River, originally granted to Samuel M. Williams, and being the same whereon the
254 said parties of the first part now reside, together with all the rights, members, and appurtenances thereto belonging, or in any wise pertaining; and the said parties of the first part do covenant with the said party of the second part, that, at the time of making this conveyance, they are seized of an indefeasible unincumbered title in and to said premises, which title they will forever warrant and defend against the claims of all persons whomsoever.

Nevertheless, this conveyance is made upon the following trusts, that is to say: That whereas the said parties of the first part have this day executed and delivered to Squire S. Cornett, of Travis County, Texas, the three several promissory notes of the said W'm H. Williams and John H. Williams, of even date with this deed, by the first of which, three years after the date thereof, they jointly and severally promise to pay to the order of the said Squire S. Connett, nine thousand one hundred and seventy dollars, ($9,170.00,) with interest at ten per centum per annum from date until paid, for value received; and by the second of which, four years after date, they promise to pay the same party
255 the same sum, with like interest; and by the third of which, five years after date, they promise to pay the same party the same sum, with like interest, making, in all, the sum of twenty-seven thousand and five hundred and ten dollars, ($27,510.00,) payable to the said Connett at three, four, and five years, respectively, from this date, at ten per centum interest:

Now, if the said William H. & M. H. Williams should pay the said several notes, according to the respective tenors thereof, as they mature, then this deed of trust shall become null and void; but, should they make default and fail to pay either of said notes at their respective

maturities, together with the interest that shall have accrued thereon, then and in that case the whole amount of the said twenty-seven thousand five hundred and ten dollars, or the balance of the principal and interest then remaining due thereon, shall become due immediately; and the said Isaac Wildbahn—or should he, for any reason, fail to act, any other trustee whom the holder of said notes shall appoint by deed—may enter upon said bargained premises, and, after giving due notice in the nearest newspaper to said land, for sixty days, shall
256 proceed to sell the said land at public auction, in the town of Bastrop, in said county of Bastrop, in front of the court-house door, to the highest bidder, for cash; and such trustee shall have power to execute to the purchaser a good and sufficient deed, in fee-simple, which shall carry all the covenants and warranties hereinbefore stipulated; and he shall apply the proceeds of said sale as follows: First, to the payment of the expenses of this trust up to that time incurred; and, secondly, to the payment of the balance of principal and interest then remaining due upon said notes; thirdly, the residue, if any, he shall pay to the parties of the first part, their heirs or legal representatives. And the said parties of the first part hereby agree that, should the said trustee die and no other be named by deed, then, at the request of the holder of said note, the sheriff or assessor of the county of Bastrop, whoever the same may be, may, at the request of said holder, execute the trust hereinbefore described. And in the event of the death of the said grantors, or either of them, before the satisfaction and fullfillment of said trust, they, the said grantors,
257 direct and bind themselves respectively, their heirs, assigns, executors, and administrators, that the power and authority of the said trustees named or to be named, or of the sheriff and assessor hereby created and conferred upon them as such trustees, shall not thereby be revoked, lessened, or impaired, but the same shall be executed to their fulfillment without any application to, or any interference by, the heirs, executors, or administrators of the said grantors, or to probate, or county, or other court of this State, or elsewhere; that the same shall be executed just as though no such death had intervened; and the trustees shall have the right to put the purchaser in possession of the premises; and the said Eddie Williams, wife of William H. Williams, and Anna C. Williams, wife of Jno. H. Williams, execute this deed for the purpose of renouncing any claim which they may have by virtue of a homestead or other right.

In testimony whereof the parties have hereto set their hands the day and year above written.

(The interlineation of the word "& seventy" in the 2nd page, & twenty-fifth line from the top, and the word "five" in eighth line & 3d
258 page, and the word "ten" added to the 9th line, and also the word "five" & "ten" on the 25th line, 3d page, made before signing.)

W'M H. WILLIAMS.
JNO. H. WILLIAMS.
A. C. WILLIAMS.
E. E. WILLIAMS.

Witnesses:
N. S. RECTOR.
W. A. HIGHSMITH.

THE STATE OF TEXAS,
County of Bastrop:

Before me, the undersigned authority, personally came W'm H. Williams and wife, E. E. Williams, and Jno. H. Williams and his wife, A. C. Williams, all of the county and State above named, and to me well known, whose names appear to the above & foregoing instrument of writing, dated the 1st day of January, A. D. 1864, and the said W'm H. & Jno. H. Williams acknowledged that they had signed, executed, and delivered the above instrument for all the purposes and considerations therein contained.

And the said E. E. Williams, wife of W'm H. Williams, and the said A. C. Williams, wife of the said Jno. H. Williams, having been examined by me separately and apart from their said husbands, and having
259 had this instrument of writing fully explained by me to them, they, the said E. E. & A. C. Williams, acknowledged that they had signed & executed the same for all the purposes and considerations therein contained; that the same is their free act and deed, without any undue influence of their husbands; and that they did not wish to retract it.

In testimony whereof I have set my hand & seal of office this the 6th day of Feb'ry, 1864.

[L. S.] W. A. HIGHSMITH,
Clk Co. C. B. Co.

OFFICE COLLECTOR INT. REV.,
3D DIST., TEXAS,
Austin, Feb'ry 21st, 1869.

The foregoing mortgage stamped by me upon satisfactory evidence, and penalty remitted.

R. N. LANE, *Collector.*

[5 stamps for 5.00 piece; 12 stamps for 25 cents.]

THE STATE OF TEXAS,
County of Bastrop:

I, W. A. Highsmith, clerk of the county court of said county,
260 certify that the foregoing mortgage or deed of trust and certificate of authentification was, at 2 o'clock p. m., Feb'ry 6th, 1864, filed for record, and was, at 9 o'clock a. m., Feb'ry 9th, 1864, correctly recorded in book letter M of deed records, in pp. 558, 559, & 560.

In witness whereof I have set my hand & seal of office, at office in Bastrop, day above named.

[L. S.] W. A. HIGHSMITH,
Clk C. C. B. Co.

XI. Deed of appointment from S. S. Connett to N. Rector and Ed. Firmin:

The same is endorsed as follows: "S. S. Connett vs. deed of app't. N. Rector and Ed. Firmin. Filed for record in my office at 12 o'clock m., July 24, 1867. Jno. M. Claiborne, C. C. C. B. Co." And is in words to wit:

STATE OF MISSOURI, *County of Buchanan:*

Whereas, on the first day of January, A. D. 1864, at the county of Bastrop, in the State of Texas, William H. Williams and John H. Williams, and A. C. Williams and E. E. Williams, their wives, executed

a deed of trust, whereby they conveyed to Isaac Wildbahn a league of land, No. 4, in the county of Bastrop, in the State of Texas, on
261 the east bank of the Colorado River, originally granted to Samuel M. Williams, which is more fully described in said deed of trust recorded on pp. 558 & 560, in book letter M of the records of the county court of the said county of Bastrop; which deed was given to secure the payment of three promissory notes of that date, each for nine thousand one hundred and seventy dollars, payable to Squire S. Connett, respectively, at three, four, and five years from the said first day of January, A. D. 1864, with interest at ten per centum per annum from date.

And whereas, by the said deed of trust, it is provided that, should the said William H. and John H. Williams make default, and fail to pay either of said notes at their respective maturities, together with the interest which shall have accrued thereon, then & in that case the whole amount of the said twenty-seven thousand five hundred & two dollars of the balance of the principal and interest then remaining due thereon shall become due immadiately.

"And it is further stipulated as follows: And the said Isaac Wildbahn, or, should he for any reason fail to act, any other trustee
262 whom the holder of said notes shall appoint, by deed, may enter upon said bargained premises, and, after giving notice in the nearest newspapers to said land for sixty days, shall proceed to sell said land at public auction, in the town of Bastrop, in said county of Bastrop, in front of the court-house door, to the highest bidder for cash;" all of which will more fully appear by reference to said deed so recorded.

And whereas no part of said moneys has been paid, and the whole is therefore due; and whereas the said Isaac Wildbahn has since died: Now, therefore, I, Squire S. Connett, of the county of Buchanan, in the State of Missouri, in consideration of the premises, do hereby appoint Nelson Rector and Ed. Firmin, of the county of Travis, in the State of Texas, jointly and severally, to execute said trust in all its parts, according to the tenor of said deed of trust.

In witness whereof I have hereunto set my hand & seal this 11th day of March, A. D. 1867.

SQUIRE S. CONNETT.

[$1 U S. I. R. stamp.]

STATE OF MISSOURI, *County of Buchanan:*

263 Before the undersigned, clerk of the circuit court of said county and State, which is a court of record having a seal, personally appeared Squire S. Connett, the grantor in the foregoing deed, who acknowledged that he signed and delivered said deed for the uses and purposes therein contained.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 11th day of March, A. D. 1867.

[L. S.] FRANK G. HOPKINS, *Clk.*

[5-c. I. R. stamp.]

I, William Heren, judge of the circuit court of the above-named county, do hereby certify that the above certificate is in due form, and by the proper officer.

Given under my hand this 11th day of March, A. D. 1867.

WILLIAM HEREN,
Judge of 12th Judicial Circuit.

THE STATE OF TEXAS, *County of Bastrop:*

I, Jno. M. Claiborne, clerk of the county court of Bastrop County, do hereby certify that the foregoing and within deed of conveyance
264 with the certificate of authentication was filed for record in my office at 12 o'clock m. the 24th day of July, A. D. 1867, and recorded in book letter N, on page 503, of deed records, &c., for said county, at 3 o'clock p. m. the 24th day of July, A. D. 1867.

In testimony whereof I hereto sign my name and affix the seal of said court at office in the town of Bastrop this the 24th day of July, A. D. 1867.

[SEAL.] JNO. M. CLAIBORNE,
C. C. C. B. Co.

XII. Deed of Rector and Ed. Firmin to S. S. Cornett:

The same is endorsed as follows: "N. S. Rector and Ed. Firmin, trustees, &c., to S. S. Cornett. Conveyance. Filed for record in my office at 12 o'clock m. the 24th day of July, 1867. Jno. M. Claiborne, C. C. C. B. Co." And is in words as follows:

STATE OF TEXAS, *County of Bastrop:*

Whereas, on the first day of January, A. D. 1864, William H. Williams & his wife, Eddie Williams, & John H. Williams & his wife, Anna C. Williams, executed and duly acknowledged a deed of
265 trust to Isaac Wildbahn, as trustee, to secure to Squire S. Cornett three several notes executed by the said W. H. Williams & the said John H. Williams, payable to the said S. S. Connett; all of them dated the said first day of January, 1864, payable, respectively, three years, four years, and five years after date, each for the sum of nine thousand one hundred & seventy dollars, with ten per cent. interest per annum from date. By which deed of trust the said Isaac Wildbahn, in default of the payment by the makers of any of said notes, is authorized to sell in accordance with the terms of said deed of trust a league of land situated in Bastrop County, Texas, on the east bank of the Colorado River, originally granted by the Government to Samuel M. Williams; which land is in said deed of trust conveyed in trust to said Isaac Wildbahn.

And whereas it was further provided in said deed of trust that, should the said Isaac Wildbahn, for any cause, fail to act as such trustee, that any other trustee whom the holder of the notes should appoint might act in the place of the said Wildbahn; and whereas the said
266 Isaac Wildbahn, by reason of his death, failed to act; and whereas the said W. H. & J. H. Williams, at the maturity of the first of said notes, wholly made default in the payment of the same, & has never paid the same; & whereas, upon the death of said Wildbahn, the said Squire S. Cornett, being then & now the holder of said notes, did, by deed, on the eleventh (11th) day of March, A. D. 1867, appoint the undersigned trustees, jointly & severally, to execute the trusts & powers set forth in said deed of trust: Therefore we, the said trustees, as substituted, to wit, Nelson Rector & Ed. Firmin, did proceed jointly and severally, in accordance with said original deed of trust & deed of substitution, to execute said trust; & having, in accordance with said deed, duly advertised the said above-described tract of land for sale, for sixty days previous to the day of sale, in the Bastrop Advertiser, it being the nearest newspaper to the land offered for sale, did, between the usual hours of sale, on the 18th day of June, A. D. 1867, publicly offer

said land for sale for cash to the highest & best bidder, at auction, in the town of Bastrop, in said county, in front of the court-house door of said county of Bastrop, & thereupon having cried the same publicly for a reasonable length of time, and offered the same for sale in all
267 respects in full compliance with the terms of said deed of trust & deed of substitution, did knock off the same to the said Squire S. Connett at the sum of one dollar per acre, that being the bid of the said Connett, & being the highest & best bid offered for said land; and the said Connett having paid to us in hand the said sum of one dollar per acre, amounting to the sum of four thousand four hundred and twenty-eight dollars, the receipt whereof is hereby acknowledged, we do by these presents bargain, sell, and convey unto the said Squire S. Connett and his heirs forever, in fee-simple, the above-described league of land, originally granted to the said Samuel M. Williams, hereby vesting in the said Squire S. Connett all the right, title, claim, & interest in & to said land of the said John H. Williams & his said wife, Anna C. Williams, & of the said W. H. Williams & his said wife, Eddie Williams, fully hereby conveying the same to the said Squire S. Connett, with all the covenants of warranty, homestead rights, & other incidents, together with all the improvements, of whatever character, thereon, as provided for in said deed of trust, which deed of trust is here more fully referred to as constituting a part of this conveyance, & to be
268 found duly recorded in Bastrop Co. in book letter M of deed records, pages 558, 559, 560, the same being recorded on the 6th day of February, A. D. 1864.

In witness whereof we hereunto set our hands & seals (using scrolls for seals) this the 18th day of June, A. D. 1867.

N. S. RECTOR, *Trustee.* [SEAL.]
ED. FIRMIN, *Trustee.* [SEAL.]

THE STATE OF TEXAS, *Travis County:*

Personally appeared before me, a notary public in and for the county and State aforesaid, N. S. Rector & Ed. Firmin, parties to the within deed, each of whom is to me well known, who acknowledged to me that they each signed, sealed, & delivered said deed for all the purposes, uses, & considerations therein set forth and expressed.

To witness which I hereunto sign my name and affix my notarial seal at Austin this 13th day of July, A. D. 1867.

[SEAL.] JAMES B. MORRIS,
Notary Public T. Co., Tex.

[Four $\frac{05}{100}$ dollars I. R. stamps cancelled.]

THE STATE OF TEXAS, *County of Bastrop:*

269 I, Jno. M. Claiborne, county clerk of Bastrop Co., do hereby certify that the foregoing and attached instrument of writing was filed for record in my office at 12 o'clock m., the 24th day of July, A. D. 1867, and the same correctly recorded at 9 o'clock a. m., July 25, 1867, in book N, deed records of said county, page 505 & 506.

In evidence whereof I hereunto sign my name and affix the seal of the county court of said county this the 25th day of July, A. D. 1867.

[SEAL.] JNO. M. CLAIBORNE,
C. C. C. B. Co.

And after the defendant had proved that Samuel L. Williams died on the 13th day of September, 1858, and that Austin M. Williams, William

H. Williams, Mary D. League, and Caroline L. Campbell, the persons through whom the title set up by the defendants was derived, were the sole heirs of Samuel M. Williams, the plaintiff offered the following evidence to impeach the validity of the chain of title above set
270 forth as held through J. H. and W. H. Williams, Wildbahn as trustee, and Firmin and Rector, substituted trustees.

(Indorsed:) No. 1054. Henry H. Williams vs. John D. Nash, Oscar Nash, John Van Hagen, & John Armstrong. Interrogatories to Major Cornett et als.

Suit pending in the circuit court of the United States for the western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN HAGEN, J. A. Hooper, and John Armstrong. } No. 1054.

To all the defendants in the above-stated cause, John D. Nash, Oscar Nash, John Van Hagen, J. A. Hooper, and John Armstrong, or John Hancock, or C. S. West, esqr., their att'ys of record:

You and each of you are hereby notified that, five days after you have been served with a copy of this notice and the following interrogatories, application will be made to the clerk of the circuit court of the United States for the western district of Texas, at Austin, where said suit is pending, for a commission to take the answers of the following-named witnesses, all of whom are resident citizens of the
271 county of Bastrop, in the State of Texas, to wit: Major Cornett, Charles Cullins, Charles Henry, and James Cornett, which interrogatories and answers are to be read in evidence for the plaintiff on the trial of the above-stated cause.

CHANDLER, TURNER & CARLETON,
Att'ys for Pl'ff.

MAY 14, 1868.

Interrogatories to be propounded to Major Cornett, Charles Collins, Charles Henry, and James Cornett.

Interrogatory 1st. (To all of said witnesses.) State whether or not you know the parties plaintiff and defendant in the above-stated cause, and which of them.

Int'y 2nd. (To all of said witnesses.) State whether or not you ever were slaves.

Int'y 3d. (To all of said witnesses.) State whether or not you have lived in Texas all your life. If you say you have not, then state where you last lived before you came to Texas, who brought you to Texas, and to whom you belonged when you came to Texas.

Int'y 4. (To all of said witnesses.) State where and with whom you have lived since you have been in Texas. State as near as you can the exact time you have lived at each place and with each person.

272 Int'y 5th. (To all of said witnesses.) State whether or not you ever knew Squire S. Cornett. If you say you did, state where you first knew him, and state whether or not he brought you to Texas. If you say he did, then state what county and State he brought you from, if you know, and state, as near as you can recollect, what took place just

before and about the time you left, and all that took place on the road from there to Texas and immediately after you reached Texas. State, if you know, how many colored people the said Cornett brought to Texas with him, and give the names of them or as many of them as you can remember.

Interr'y 6th. (To all of said witnesses.) If you have stated that the said Squire S. Cornett brought you or came with you to Texas, then state whether or not the said Cornett ever sold you and other colored people to any one in Texas. If you have answered that he did, state if you know who to and how many colored people he sold, who they were delivered to, where it was, in what county, and in whose possession you & the other colored people were when you were set free at the close of the late rebellion.

273 Interrogatory 7th. (To all of said witnesses.) If you have stated that you came from Missouri to Texas, state what time of the year you left for Texas, how long you were on the road, and how you know the time you left Missouri. Please give your reasons for knowing the time of the year when you left Missouri and when you got to Texas, and state where your journey ended in Texas.

Interrogatory 8th. (To all of said witnesses.) If you heard anything said by the said Squire S. Cornett and any other parties before you left Missouri in regard to moving the colored people to Texas, or running the colored people from Missouri, state all you heard said and who said it; and state what condition the colored people were in at and about that time, and all that took place.

Interrogatory 9th. (To all of said witnesses.) If you have stated that Squire S. Cornett came with you from Missouri to Texas, state, if you know, where he lived for the two years next preceding his coming to Texas.

CHANDLER, TURNER & CARLETON,
Att'ys for Pl'ff.

Cross-interrogatories propounded by the def's to same witnesses,
274 to be answered at same time of answering pl'ff's interrogatories.

X-int'y 1st. (To each of said witnesses.) Do you recollect dates well, and are you able, from mere memory, to answer when you left Missouri, and when you reached Texas? Or have you any memorandum in writing from which you can tell? Or has any one told you the right time when you left Missouri and when you got to Texas? If yea, who has told you & when?

X-int'y 2. If any one has been talking to you about when you left Missouri or when you got to Texas, state who it was, & when & how often you were talked to by him. What time did he fix as the right time when you left Missouri and when you got to Texas? Who is present while you answer?

HANCOCK & WEST,
Att'ys for Def'ts.

Copy & five days' notice of foregoing interrogatories waived, and we agree the answers may be taken by any officer authorized to take & return depositions without a commission.

HANCOCK & WEST, *Att'ys for Def's.*
CHANDLER, TURNER & CARLETON,
Att'y' for Pl'ff.

275 Interrogatories for Dan. Duncan Green Duncan.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN Hagan, John A. Hooper, and John Armstrong. } No. 1054.

In circuit court of the United States for the western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN Hagen, J. A. Hooper, and John Armstrong. } 1054.

To the defendants, John D. Nash, Oscar Nash, John Van Hagen, J. A. Hooper, and John Armstrong, or to John Hancock, or C. S. West, esq'r's, their att'ys of record in the above stated and numbered cause:

You and each of you are hereby notified that, five days after you have been served with a copy of this notice and the following interrogatories, propounded to Dan. Duncan and Green Duncan, witnesses for the plaintiff, who are resident citizens of the county of Bastrop, in
276 the State of Texas, application will be made to the clerk of the circuit court of the United States for the western district of Texas, at Austin, where the foregoing cause is pending, for a commission to take the answers of said witnesses; which interrogatories and answers will be read in evidence for the plaintiff on the trial of the above stated and numbered cause.

CHANDLER, TURNER & CARLETON,
For Pl'ff.

MAY 21ST, 1868.

Interrogatories to be propounded to Dan. Duncan and Green Duncan.

Int'y 1st. (To both of said witnesses.) State whether or not you know the parties to this suit, and which of them?

Inter'oga'y 2nd. (To both of said witnesses.) State whether or not you have always lived in Texas. If you say you have not, please state where you lived before you came to Texas.

Int'y 3d. (To both of said witnesses.) State whether or not you were ever slaves. If you say you were, please state who you belonged to. State whether or not you were held as slaves when you came to Texas. If so, who claimed you, and who brought you to Texas?

277 Int'y 4. (To both of said witnesses.) If you have stated that you were held as slaves when you came to Texas, state where you first stopped in Texas, and who with, and in what neighborhood. State whether or not you were hired out immediately after you came to Texas; and, if you say you were, state who you were first hired to and how long you lived with such person. Please state the names of the different persons you have lived with since you came to Texas, and how long you have lived with each person.

Int'y 5th. (To both of said witnesses.) State, if you can, how long you have lived in Texas.

Int'y 6. (To both of said witnesses.) If you have stated that you have not always lived in Texas, state when you started for Texas; what year

and what time of the year did you start for Texas, and what month of the year did you start; what State and county did you start from, how long were you in getting out of the State you started from, and where did you first go to?

278 Int'y 7th. (To both of said witnesses.) How did you leave the State you came from to Texas? State all that happened that caused you to be brought to Texas, and how you were brought to Texas. Were you or not in irons?

Interrog'y 8th. (To both of said witnesses.) State whether or not you ever were sold in Texas. If you state you were, please state who sold you and who you were sold to. If you have said you were sold in Texas, then state whether or not there was any colored people sold by the same persons to the same party at the same time. If so, state the names of the people sold, if you know them.

Int'y 9. (To both of said witnesses.) State any other fact that you may know which will benefit either of the parties to this suit.

CHANDLER, TURNER & CARLETON,
Attorneys for Pl'ff.

Cross-interrogatories to said above-named witnesses, to be answered at the same time of answering the pl'ff's interrogatories.

X-int'y 1st. How do you ascertain the dates, the year, the month, & the day of the month that you are asked about? Have you any
279 memorandum in writing, or has any one told you the right days and months? If so, who has told you? Who has been talking to you or either of you about these things?

X-int'y 2nd. If you say any one has been talking to you about when you left the State of Missouri and when you came to Texas, state who it was, and when and how often you were talked to by him? What time did he say he wanted to prove that you or Cornett left Missouri?

HANCOCK & WEST,
Att'ys for Def'ts.

We waive copy & five days' notice of the foregoing interrogatories, and consent the answers may be taken by any officer authorized to take and return depositions without a commission.

HANCOCK & WEST, *Att'ys for Def's.*
CHANDLER, TURNER & CARLETON,
Att'ys for Plaintiff.

Suit pending in the circuit court of the United States for the western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN Hagen, J. A. Hooper, and John Armstrong. } No. 1054.

280 Major CORNETT, having been summoned, as the law directs, appeared and answered direct and cross interrogatories propounded in above-entitled cause as follows, to wit:

To 1st direct int'y he states: That he knows the parties, plaintiff and defendant in above-stated cause.

To 2 int'y he states: That he was once a slave.

To 3 int'y he states: That he has not lived in Texas all his life—lived

before he came to Texas in Buchanan, in State of Missouri; was brought to Texas by William Cornett and Squire Cornett, and said Squire Cornett sold him to John Williams after he came to Texas.

To 4th int'y he states: That he first lived in Texas twelve miles from Austin, on Gillelan's Creek, with Sam. Wilburn; lived there two years; next lived with Jno. Williams, in Bastrop County; lived with him one year and six months.

To 5th int'y he states: That he knew Squire S. Connett; first knew him in Buchanan County, Missouri, and that said Connett and his father brought witness to Texas; brought him from Buchanan County, State of Missouri; that, just before he left Missouri, Cornett put witness
281 & another boy in chains; that the next day or night said Squire Cornett told his father that if he did not move his darkies away from there he would lose them all; that the next morning after this, which was Sunday, old man Cornett and two of his sons, Squire and William, started down to Judge Duncan', taking witness and all the darkies with them; stayed at Judge Duncan's that night, and the old man Cornett and his son Squire S. Cornett started to Texas, bringing witness and all the darkies with them; travelled on till Tuesday night following, when late in the night, some men came to the camp and told Cornett that the enemy was close by, at New Market, and that he had better get away as fast as possible; that they started at once, and came as fast as possible to the Missouri River when they overtook the confederate army, and from there they came on as fast as possible to Texas, traveling a good deal of the time day and night, making no delay till they got to Texas; that Cornett brought about thirty-two colored people with him to Texas of his own; their names were Major, Thomas, Hannibal,
282 Ned, Lucinda and her four children, Martha, Mayo, Jonah, & Henry, Frank, Marild, Mason, Reverend, Samuel, Mary, James, Dick, Martin, Scott, Crippled Jim, Richard, George, Clara, & Ritta. These belonged to Cornett; also, Sandy, Lewis, & Catha. He also brought to Texas, Charles, Green, Dan, John, Louisa, Duff, Arthur, George and Lild.; all of which belonged to Judge Duncan.

To 6th int'y he states: That Squire S. Cornett sold witness and other colored people to John Williams, in Bastrop Co., as before stated; that he sold about thirty-two in number, and delivered them to John Williams, in Bastrop County, and remained in possession of said Williams until they were set free.

To 7th int'y witness says: That he thinks they left Missouri about the last of August, and were on the road four weeks. That the reason he knows it was about the last of August when they left Missouri was, that they always commenced cutting hemp in that State about the first August and generally finished about the middle of the month, and
283 that they finished cutting the crop about two weeks before they left there, and arriving at the end of their journey, at Sam. Wilburn's, about 12 miles from Austin, about the middle of September.

To 8th int'y witness states: That, about a week before they left Missouri, he heard Squire Cornett tell his father, that if the Yankee soldiers had reached St. Joseph and that if he did not do something with his negroes soon he would loose all he had. The father replied that before he would lose his property he would take them out and kill them. Witness states further, that the negroes were in very good condition at that time.

To 9th int'y witness states: That Squire S. Cornett lived on the same

place on which his father lived for two years prior to the time he started to Texas.

his
MAJOR + CORNETT.
mark.

Answers to cross-interrogatories.

To 1st X-int'y witness states: That he knows very little about the days of the month, but can recollect very well anything that takes place; that he only remembers or knows the time he left Missouri from the time they generally finished cutting hemp, as stated in direct interrogatories; knows the time they were on the road, because he could and did count the weeks as they past; has no memorandum on the subject in writing, and that no one ever told him anything about the time.

284 To 2nd X-int'y witness states: That no one ever talked to him on the subject; states that there are three gentlemen present while he answers—Mr. Jones, the sh'ff, and the two other he does not know.

his
MAJOR + CORNETT.
mark.

Suit pending in the circuit court of the United States for the western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN HAGEN, J. A. Hooper, and John Armstrong. } No. 1054.

CHARLES HENRY, having been summoned as the law directs, appeared and answered direct and cross interrogatories as follows, to wit:

To 1st direct int'y he states: That he knows all the parties, plaintiff and defendant in above-entitled cause.

To 2nd int'y he states: That he once was a slave.

" 3d int'y he states: That he has not always lived in Texas; formerly lived in Buchanan County, State of Missouri; belonged to the old man Cornett when he came to Texas.

To 4th int'y he states: That he first stopped at Mr. Sam. Webbarn's, on Gilleland's Creek, not far from Austin; was sick there in camp about four weeks; after which he was hired to Dr. Bacon, at Webberville; don't know exactly how long he lived with him, but thinks it was not

285 more than six months; was then hired to Mr. Sam. Chambers, on Gilleland Creek, about twelve miles from Austin, and remained there one year; then was sold to John Williams, and remained with him until he was set free.

To 5th int. witness states: That he knew Squire S. Cornett; knew him first at St. Joseph, Missouri; that he and his father brought witness to Texas from Buchanan County, Missouri; that the day they left Missouri, a negro girl, named Lucinda, said she did not want to come to Texas, and attempted to hide with her children, and Cornett soon found her and brought her along in strings; also, had three or four others in strings; that they traveled night and day for some time. States that Cornett brought thirty-nine colored people with him to Texas, and whose names are as follows, to wit: Thomas, Major, Hannibal, James, Ned, Julius, Adam, Russell, Richard, Dick, Sandy, Jim,

(crippled,) Marilld, Revened, Mayo, Mason, Samuel, Scott, Francis, Hatha, Louise, Arthur Duff, Anu Gild, Martha, Roanah, Little George, Big George, Frank, Jonnie, Big Charles, Fatty Charles, Charles,
286 Henry, Mattias, Clara, Kitty, Sam, Lewis, & Mary.

To 6th int'y witness states: That Squire S. Connett came with witness to Texas, and afterwards sold witness and other colored people in Texas; that they were sold and delivered to John Williams, in Bastrop County, about forty-two in number, three of which came out ahead of witness & his crowd, and all remained in possession of said Williams till they were set free.

To 7th int'y witness says: That he does not know in what month they left Missouri, but it was in the fall; that they were sowing small grain at the time, and were on the road about four weeks; know that it was in the fall when they left Missouri, because they always sowed small grain, and they were at it when they left; that their journey ended at Sam. Wilburn's mill, about 12 *twelve* miles from Austin.

To 8th int'y witness says: That he heard nothing about moving to Texas, from Missouri, from any one, until the morning they left; that Squire Cornett told his father, that morning, that they had better be off quickly; that they were all in very good condition at the time they started.

To 9th int'y witness says: That Squire Connett lived in
287 Buchanan County, Missouri, on the same place with his father, for two years prior to the time he left for Texas.

his
CHARLES + HENRY.
mark.

Answers to X-interrogatories.

To 1st X-int'y witness says: That he can recollect dates very well when he knows them; don't know the exact day or month in which he left Missouri or when he got to Texas, & has no memorandum, nor has any one talked to him anything about the time, except John Williams.

To 2nd X-int'y witness states: That he had a conversation with Jno. Williams, about four weeks ago, in regard to the time they left Missouri and when they got to Texas; never had any other conversation with him or any one on the subject; that Williams did not tell witness when they left Missouri or when they got to Texas.

his
CHA'S + HENRY.
mark.

THE STATE OF TEXAS, *County of Bastrop:*

I, Harvey McLester, notary public of said county & State, do hereby certify that the foregoing answers of Major Cornett and Charles Henry, witnesses before-named, were made before me, and were sworn to and subscribed before me, by said witnesses, respectively, on the 5th
288 day of this month.

Given under my hand and official seal, this the 5th day of June, A. D. 1868.

[SEAL.] H. McLESTER, *N. P., B. Co.*

Suit pending in the circuit court of the United States for the western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN Hagen, J. A. Hooper, and John Armstrong. } No. 1054.

CHARLES COLLINS appeared June 6th, 1868, and answered direct and cross interrogatories as follows, to wit:

To 1st direct int'y witness says: That he does not know the plaintiff, but knows all of the defendants.

To 2 int'y witness says: That he was once a slave.

To 3d int'y witness says: That he has not lived in Texas; always lived in Buchanan County, Missouri. Was brought to Texas by old man Cornett and his son, Squire S. Cornett, and belonged to the old man Cornett when he came to Texas.

To 4th int'y witness says: That the first man he lived with,
289 after he came to Texas, was Isaac Wildburn, not far from Austin. Lived with him about a month; next, with Jno. Lancaster, near Austin, about two months; next, with Pressley George, in Bastrop Co., twelve months; next, lived with Sam. Wilburn, about twelve miles from Austin, one year; next, lived with John Williams, in Bastrop County, one year and a half.

To 5th int'y he states: That he knew Squire S. Cornett; knew him first in Buchanan County, Missouri; brought witness from Buchanan County, Missouri; that, just before and about the time they left Missouri, there was a good deal fighting between the United States & confederate soldiers; that Cornett brought the following-named colored people to Texas, to wit: Charles Collins, Major Register, James Middleton, Jim Wright, Ned Tolbert, Lewis Wright, Tom English, Mary English, Marrilla, Eliza, Lucinda Rievenid, Julius, Adam Webster, Sandy, Mason, Majo, Jonah, Frank Scott, Martha Richard, in number, twenty-three. Witness says that the boy called Major Cornett, in direct interrogatories, is named Myor Register. Cornett also brought to Texas the following-named colored people, who belonged to Judge Duncan, to wit: Charles Green, Dan, John, Arther, Duff, &
290 Louisa, Ann, & Lila, and George.

To 6th int'y witness says: That Squire S. Cornett sold witness and other colored people to John Williams, in Bastrop, Texas; that he sold twenty-three to Williams, of his own, and ten that belonged to Judge Duncan. Also, eight others were sold, but does not know to whom, except one to Mr. Boyer, on Brushy, and they were all delivered to the purchasers; and, so far as concerns those deliv'red to Williams, they remained with him till they were set free; does not know as to the other.

To 7th int'y witness says: That he left Missouri for Texas in the fall of the year; don't know the month or day; states that they were on the road five weeks; knows that it was in the fall when they left Missouri, because they gathered the hemp crop, and there had been some frosts. Their journey ended at Mr. Wilburn's, not far from Austin. It was about two months till Christmas when they got at Mr. Wilburn's.

To 8th int'y witness says: That Squire S. Cornett told his father about three weeks before they left Missouri that if they did not move the colored people from there soon, they would lose them all; heard no one else say anything about it.

291 To 9th int'y witness says: That Squire S. Cornett lived in Buchanan County, Missouri, for two years prior to the time he started to Texas.

his
CHARLEY + COLLINS.
mark.

Answers to cross-interrogatories.

To 1st X-int'y witness says: That he don't know much about dates; can remember any time or circumstance that occurs, very well; states that he only knows that it was in the fall when they left Missouri, and that they were on the road five weeks, & that they got here about two months before Christmas; has no memorandum on the subject, and no one has ever told witness the time they left Missouri, or when they got to Texas.

To 2nd int'y witness says: That he does not remember ever having talked to any one on the subject; says there are two gentlemen present, but does not know the name of either of them; one of them is the gentleman who is writing down my answers.

his
CHARLEY + COLLINS.
mark.

DAN DUNCAN also appeared and answered direct and cross interrogatories propounded to Dan and Green Duncan, as follows, to wit:

To 1st direct int'y witness states: That he does not know the plaintiff in said cause; knows all of the defendants.

292 To 2nd int'y witness says: That he has not always lived in Texas; formerly lived in Platt County, Missouri.

To 3d int'y witness says: That he was once a slave; was held as a slave by Judge Duncan when he came to Texas; was brought to Texas by Judge Duncan's son.

To 4th int'y witness says: That he first stopped in Red River County, Texas, with a man by the name of Robins; was hired out immediately after he came to Texas to a man by the name of Chambers, & remained with him about four months; next lived with Mr. Gill, same neighborhood, one year; next lived with a man by the name of Howard, in Grayson County, about four months; next with a man by the name of Butler, about three & a half or four months; next hired with Jno. Williams, in Bastrop County, Texas, till he was set free.

To 5th int'y witness says: He has lived in Texas about seven years next August.

To 6th int'y witness says: He thinks they left for Texas in July, 1861; came from Platt County, State of Missouri; was about two weeks in getting out of the State; stopping in Red River County, Texas.

293 To 7th int'y witness says: That he left Missouri in irons; left Missouri because the war had commenced and there was danger of losing all the colored people if they remained there.

To 8th int'y witness says: That he was sold in Texas to John Williams by Judge Duncan. There were others sold at same time by & to same parties, to wit: Charles, John, Green, and David; Louisa, Ann, Arthur, Duff, Lila, & George.

To 9th int'y witness says: That he does not know any other fact that will benefit either party to this suit.

DANIEL DUNCAN.

Answers to X-interrogatories.

To 1st X-int'y witness : That he can read and write, and knows very well how to keep the day of the month, year, &c.; has no memorandum on the subject, nor has any one told him, and no one has talked to him on these things.

To 2nd X-int'y witness says: That he had one conversation with Jno. Williams about leaving Missouri. Mr. Williams did not say what time that we left Missouri, or what time he wanted to prove.

DANIEL DUNCAN.

JAMES CORNETT appeared and answered direct and cross interrogatories propounded to Major Cornett et als:

To 1st direct int'y witness says: That he knows the parties to this suit except plaintiff and Hagen.

294 To 2nd int'y witness says: He was once a slave.

To 3d int'y witness says: That he has not always lived in Texas; lived formerly in Buchanan County, Missouri, and came from there to Texas with Major Cornett, and belonged to him at the time.

To 4th int'y witness says: That they stopped at Mr. Wilburn's, near Austin, when they first came to Texas. Witness remained there only two or three days. Picked cotton for Wilburns one day while there; was then hired to Col. Banks, near Wilberville; lived with him fourteen months; next lived with Mr. Straws, in Bastrop County, one year; was then sold to Mr. John Williams, and remained with him till set free.

To 5th int'y witness says: That he knows Squire S. Cornett; first knew him in Buchanan County, Missouri; that the old man Cornett brought witness to Texas, & Squire Cornett was along; that the day they left Missouri, Squire S. Cornett told his father that if they did not leave there they would lose all of the colored people, and they left at once; don't recollect that anything particular took place on the road or immediately after they got here; says that Cornett brought with

295 him to Texas the following-named colored people, to wit: Charley, James, Jim, Hannibal, Russell, Eliza, Mary, Marilla, Rievenid, Mason, Cothon, Frances, Mattie, Mariah, Kitty, George, Richard, Dick, Scott, Tom, Major, and Charles; Lucinda, Joanah, Majo, Martha, Samuel, Ned, & Sandy—twenty-nine in number—which belonged to him; brought for Judge Duncan the following, to wit: Charles, Dan, Green, Jenny, Louisa, Arthur, Duff, George, Gild, Ann.

To 6th int'y witness states: That Squire S. Cornett sold witness and other colored people in Texas; sold them to John Williams in Bastrop County; twenty-nine sold that belonged to him & ten for Judge Duncan; all sold and delivered to John Williams; remained in his possession till they were set free.

To 7th int'y witness says: That they left Missouri, as well as he can remember, in Sept., 1861; were on the road five weeks; knows it was in the fall when they left Missouri, because they had cut all the hemp and were sowing rye & had gathered some corn; that their journey

296 ended in Texas at Mr. Wilburn's mill about twelve from Austin.

To 8th int'y witness says: That he heard nothing said about moving to Texas before they started; that the colored people were not in good condition at the time they left Missouri; were not well clothed; don't remember that anything particular took place on the road.

To 9th int'y witness says: That Squire S. Cornett lived in Buchanan County, Missouri, for two years prior to his coming to Texas.

his
JAMES + CORNETT.
mark.

Answers to X-interrogatories.

To 1st X-int'y witness says: That he does not recollect dates well, but can tell about the time we left Missouri; thinks he left there in 1861, in the fall; has no memorandum; had a conversation once with Jno. Williams about the time they left Missouri; that Williams said that, from all the information that witness could give him, he must have gotten to Texas in 1861.

To 2nd X-int'y witness says: That he never had any conversation with any other person on the subject; that there are two gentlemen present while he answers, one of whom is the gentleman who takes down my answers; don't know either of them.

his
JAMES + CORNETT.
mark.

297 Suit pending in the circuit court of the United States for the western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH, OSCAR NASH, JOHN VAN HAGEN, J. A. Hooper, and John Armstrong. } No. 1054.

GREEN DUNCAN appeared and answered direct and cross interrogatories propounded to Green & Dan Duncan in said cause:

To 1st direct int'y witness says: That he knows the def's, but does not know plaintiff.

To 2d int'y witness says: That he has not always lived in Texas, formerly lived in Platt County, Missouri.

To 3d int'y witness says: That he was once a slave and belonged to Judge Duncan; belonged to him when he came to Texas; was brought to Texas by Ran. Duncan, a brother of Judge Duncan.

To 4th int'y witness says: That he stopped first in Red River County, Texas, with Mr. Robins.

To 5th int'y witness says: That he has lived in Texas about seven years.

To 6th int'y witness says: That he started for Texas in the year 1861, about from the first to the 6th of August; came from Platt County,
298 Missouri; was about two weeks in getting out of the State, and first stopped in Red River County, Texas.

To 7th int'y witness says: That he left Missouri handcuffed to his brother, Dan Duncan. The war was going on close by, which caused witness to be brought to Texas.

To 8th int'y witness says: That he was sold in Texas by either his master or Mr. Squire Cornett; don't know which; sold to John Williams; there were two others sold at same time to same party, to wit, Dan Duncan and a little boy named Duff.

To 9th int'y witness says: That witness and his brother, Dan, were the only negroes belonging to Judge Duncan that came out together.

GREEN DUNCAN.

Answers to X-interrogatories.

To 1st X-int'y: That he ascertains the year in which he left Missouri, by the fact that it was in the first year of the late war, which almost every one knows was '61, and that he left a few days after Western, on the Missouri River, was captured by the Federals; knows that it was about the first of August when he left, because they had laid by their crops, cut their hay, and were preparing to cut hemp, and it is a custom there to cut hemp in August; states that Mr. John Williams
299 asked him once what time he left, and he told him about the first of August.

To 2nd X-int'y witness says: That no one ever talked to him except John Williams, who asked him about it once, and said he wanted to prove what time he, witness, left there; did not state any particular time that he wanted to prove; this conversation took place about a month ago.

GREEN DUNCAN.

THE STATE OF TEXAS,
County of Bastrop:

I, Harvey McLester, notary public of said county & State, do hereby certify that the foregoing answers of Charles Collins, Daniel Duncan, and Green Duncan, the witnesses before named, were made before me, and were sworn to and subscribed before me by said witnesses, respectively, on this the 6th day of June, A. D. 1868.

Given under my hand & official seal this 6th day of June, A. D. 1868.

[SEAL.] H. McLESTER,
N. P., B. Co.

Interrogatories to be propounded to Mrs. Margaret Chamberlain.

Interrogatory 1st. State whether or not you know the parties
300 to this suit and which of them.

Int'y 2. State whether or not you know, or ever knew, a man by the name of Squire S. Cornett. If yea, state when and where you first knew him. State whether or not you know the month and the year when the said Cornett first came to Texas, and the county and State from which he came. If you say you do, please state the month and year in which he (the said Cornett) first came to Texas, and also the county and State from which Cornett moved to Texas.

Int'y 3d. State whether or not the Squire S. Cornett brought any negroes to Texas with him. If yea, state the number, if you know.

CHANDLER, TURNER & CO.,
Atty's for Pl'ff.

Cross-interrogatories propounded by the defendants, to be answered at the same time of answering direct interrogatories of the pl'ff.

1st X-int'y. From what circumstances are you enabled, if at all, to answer definitely as to the dates about which you are asked by the pl'ff?

2nd X-int'y. Has any one approached you for the purpose of
301 ascertaining what facts you would testify to in this case? If so, who was it, and when, and what facts did such person say he desired to proof by you, and what interest had he in the case, or what reason, if any, did he give for the interest he was taking in the matter?

HANCOCK & WEST,
Atty's for Def'ts.

We waive five days' notice & copy & the issuance of commission, & consent the answers may be taken & returned by any one authorized to do so.

May 25th, 1868.

HANCOCK & WEST, *Atty's for Def'ts.*
CHANDLER, TURNER & CARLETON,
Atty' for Pl'ff.

HENRY H. WILLIAMS
vs. } 1054.
JOHN D. NASH ET ALS.

By virtue of the agreement between the attorneys of the parties in this cause, *and* the interrogatories propounded in said cause to Mrs. M. E. CHAMBERLAIN, who, being by me duly sworn, deposed and answered said interrogatories as follows, to wit:

Answer to interrogatory 1st. I do not know either of the parties to this suit.

302 Ans. to 2 int'y. Yes, sir; I knew him. I first knew him in Texas. I was not acquainted with him until he moved to this State. I do. He came to this State in the year 1861, and in the month of October. He was from the county of Buchanan, in the State of Missouri.

Answer to interrogatory 3d. He brought some negroes with him, but I cannot be certain as to the number, but think he must have had about twenty.

Answers of the same witness to cross-interrogatories.

Ans. to cross-interrogatories 1st. I know it was the first fall of the year after the war commenced that Mr. Cornett moved to Texas, and I am enabled to remember the month from the fact that I was attending a meeting at Webberville, in October, and he came during that meeting. Another circumstance is, that my aunt was taken sick, which prevented me from attending the meeting to its close, and Mr. Cornett visited us while she was sick.

Answers to cross-interrogatorys 2nd. No, sir. They have not.

M. E. CHAMBERLAIN.

Sworn to and subscribed before me this the 12th day of June, A. D. 1868.

FRANK BROWN,
Clerk D. C. T. Co.
Per J. F. FULLER, *D'y.*

303 THE STATE OF TEXAS,
County of Travis:

I, Frank Brown, clerk of the district court of Travis County, hereby certify that Mrs. M. E. Chamberlain appeared before me and made the foregoing answers, signed the same in my presence, and swore to the truth of the same before me, said answers being reduced to writing by me.

Witness Frank Brown, clerk of said court, with the seal thereof attached, at office in the city of Austin, this 12th day of June, A. D. 1868.

[L. S.]

FRANK BROWN,
Clk D. C. T. Co.
Per J. F. FULLER, *D'y.*

Interrogatories propounded to J. H. Williams.

Int'y 6. State whether or not you are acquainted with one Squire S. Cornett; and, if so, where does he live? How long have you known him? And state how you may know where said Cornett lives.

Int'y 7. State whether or not you ever had any business transaction or transactions with said Cornett, and whether yourself and any
304 other person with you ever had any business transactions with him. If yea, state fully the time of the transactions, and what the transaction was.

Int. 8. State whether or not you purchased, or whether you and some other persons with you ever gave your promissory note or other obligations to the said Cornett. If yea, state what notes and what obligations. And state fully the consideration of those notes and other obligations, if any such they were.

Int. 9. State, if you say that yourself and William A. Williams did give any such notes and other obligations, what became of them, and what was done with them.

Int'y 10th. If you state you had any business transaction, in connection with the said W'm H. Williams, with the said Cornett, and if you have stated that you purchased certain negroes, wagons, teams, and other property of Cornett, which constituted the consideration of said notes or other obligations, then state what business you and the said W'm H. Williams were engaged in at the time of such purchase, and in whose employ; and state for what purpose and use the said negroes, wagons, teams, and other property, if any such was purchased, was by you and the said W'm H. Williams purchased; and state fully
305 whether the said Cornett knew, at the time of the purchase and before, the business you were engaged in, & under whose employ, and for what purpose the said property was so purchased.

Int. 11. State, if you have any knowledge, where the said negroes, wagons, teams, and other property came from to Texas, and when it left its previous locality, and when the same arrived in Texas, and your means of knowing.

Int. 12. State any fact or matter connected with the subject inquired about which may be material to either party to this suit, as fully as if you had been fully enquired in relation thereto.

CHANDLER, TURNER & CO.,
Att'y for Pl'ff.

Answers to interrogatories propounded to J. H. Williams.

Ans. to 6 int'y. I am acquainted with Squire S. Connett. He lives in Buchanan County, Missouri. I have known him for about five years. I know where he lives from his own statement, & also because, in a certain suit brought against me in the district court of the State of Texas, Bastrop County, he alleges that he does reside in the said county & State.

Ans. to 7 int'y. I have had business transactions with the said Cornett, & W. H. Williams was concerned with me in the said transactions. The said transactions were had in September of 1863, & during
306 the year 1864, & in the interval, as well as I remember. The transactions were for the purchase of some negroes, mules, & a wagon, & the business growing thereout.

Ans. to 8 int'y. I did purchase property of the said Connett, and gave, in connection with W. H. Williams, our joint promissory notes, or

obligations, for the same. All of said obligations but one were plain promissory notes, secured by deed of trust upon the above said league of land, No. 4, granted to S. M. Williams. The one not so secured was in the following words & figures:

"Thirty days after date we, or either of us, promise to pay to the order of Squire S. Cornett nine thousand six hundred dollars, which may be discharged in part European exchange, drawn by Droege, Oetlin & Co., of Mattamores, with interest on the same at the rate of ten per centum per annum from the 1st of January, last past, till paid, for value received, this 8th day of February, 1864.

(Signed) "W. H. WILLIAMS.
"JNO. H. WILLIAMS."

The consideration of the said obligation was negro slaves & some mules & a wagon.

Ans. to 9 int'y. I cannot state what was done with the obliga-
307 tion in question, further than that they were delivered to the said Cornett. Subsequently suit was brought in dist. court Bastrop Co., on the promissory notes secured by the deed of trust, which was afterwards dismissed. Suit was brought also on the obligation copied in the answer to the preceeding interrogatories & judgement obtained upon it.

Ans. to int'y 10th. We were engaged at the time of the said purchase in erecting a cloth-factory, under contract with the confederate government, on the said league of land (No. 4) on which we then resided. We were in the employ of the said confederate government, & the said negroes, mules, & wagon were purchased for the purpose of enabling us to comply with our contract with the said gov't. The said Cornett did know at the time of the purchase of our said employment, & must have known before, it being a matter of common notoriety. The said Connett further knew it from our own statements made to him at the time. The contract to purchase the negroes was made in September, 1863; they were to be delivered the 1st Jan'y, 1864, & that time we were to have made a cash payment of $9,000, on account of the said
308 negro trade. The difficulty of placing so large an amount of coin in Austin was represented to the said Cornett; it was explained to him that we relied upon our facilities afforded by the gov't to get cotton to Brownsville to realize the amount in question; the difficulty of moving so large an amount of money through the country such a distance was represented, & the privilege of paying the amount on the Rio Grande was asked for. Subsequently, & prior to the 1st of January, 1864, Brownsville was captured, and communication with the Rio Grande was temporarily cut off, or made extra hazard'us, whereupon representations were made to the said Cornett of our inability to make the cash payment; the result of all which negotiation was the giving by us of the obligation copied in answer to int'y 8th. In the interval of these negotiations the mules & wagon was sold to us for $600, and included in the obligation, making it for $9,600, as it now reads. The said Cornett knew, also, from another circumstance, of our said employment with the said confederate gov't. The contract for purchase was made in September, 1863; but the actual delivery of the slaves & con-
309 summation of the trade was not to take place until Jan'y 1st, 1864. The confederate gov't was impressing slaves at the time the question of Mr. Cornett's ability to deliver the negroes according to contract, in view of their liability to be impressed in the mean-

time, was raised & discussed. In settlement of this difficulty it was suggested & acquiesced in that the order from the confederate authorities protecting all slaves in our employment from impressment would avail to protect any of these slaves in case of impressment, inasmuch as from the date of their delivering to us they would thenceforth be permanently employed in fulfilment of a gov't contract.

Ans. to 11th int'y. The negroes, wagon, & mules all came from Missouri at the same time. I cannot state when this property left Missouri, nor when it arrived in Texas, except from hearsay. I know the property all came together, because I know it was all brought by Squire S. Connett, & I have never heard that property was brought by him from Missouri to this State but on one occasion. I know that Cornett
310 brought the property hereinbefore referred to from Missouri, by his own statements.

Ans. to int'y 12. I came first to reside upon the league No. 4, granted to S. M. Williams in 1862, & found W. H. Williams in possession of the same under a quit-claim title from his coheirs, the heirs of S. M. Williams. Subsequently we entered into a contract with the Confederate States gov't to erect & put in operation a cloth factory, in which we were joint & equal partners. As the factory was to be erected & put in operation on the league No. 4, aforesaid, to make our interest equal throughout, I purchased from the said W. H. Williams an undivided one-half interest in the said league No. 4, and received his quit-claim deed for the same. Subsequently, to effect the purchase of the negroes from the said Cornett, which was necessary to enable us to carry out our contract with the said Confederate States government, I joined with W'm H. Williams in a deed of trust, conveying the whole tract as security for the larger portion of the purchase-money of the said slaves. I remember that M. Cornett's attention was called to the character of the title vested in us, which, however, proved no barrier to the
311 transaction. I remember, also, that Mr. Cornett expressed great anxiety to get back to Missouri, & gave as a reason for his said anxiety, that he expected to heir property there, & that he was fearful lest his absence in Texas should cause it to be confiscated.

Cross-interrogatory propounded to J. H. Williams.

Cross-int. 7. Was not your trade for the negroes with Cornett actually made in Austin, in Sept., 1863, & were not the negroes actually delivered to you in Sept., 1863; & was not a written mem. of the contract by both of you left, in Sept., 1863, with George W. Paschal; & did you not afterwards exchange papers in accordance with this contract; & did you not have the use of the labor, & hire, & work of the negroes, from Sept., 1863, to July or August, 1865; and did you not, also, have the mules & team purchased by you at the same time, & in the same trade of Cornett; and, at the time of the trade in Sept., 1863, did not you & W. H. Williams & Cornett, all three of you, talk of the effect of the war then waging on slave-property in the presence of Judge G. W. Paschal; and did you not purchase, after considering all the contingencies, & fully discussing among yourselves the question of title & the chances of the bargain, emancipation, &c.? How long have you been agent for, & representative of, your father's inter-
312 ests in Texas? Who was his agent in Texas before and during the war?

Answer to cross-interrogatory 7th, propounded to J. H. Williams:

Ans. to 7th cross-int'y. An agreement was made with Cornett, in September, 1863, in the city of Austin, for the purchase of the negroes, a memorandum of which was left with Judge G. W. Paschal. The agreement did not, however, contemplate the delivering of the negroes, or the final consummation of the trade, until the 1st of January following, at which time the notes & deeds were to be executed, the negroes deliv'red, & and a cash payment of $9,000, coin, to be made to the said Cornett on account of the said trade. The principal part of the negroes were deliv'red at or about the time appointed, the 1st of January aforesaid, & the papers & notes were also executed & passed as contemplated. The negroes, as I have said, were not deliv'red in September, 1863, but the first of January following. Some of them, however, were delivered in September or shortly after, but the title to them did not become vested in us until the 1st of January following. We never paid the said Cornett any wages for the labor of the said slaves for the time they spent with us prior to the 1st of January afore-
313 said, though Cornett was drawing wages for such of them as were not so deliv'red, & the motive for fixing upon the 1st of January, as the period for the said delivering, was partly that they might complete the engagements that had been made for their services during the current year. The negroes that were sent to us in advance were not involved in engagements, or in any term of hire, & were sent to us in advance without our entering into any engagement to pay hire for the time their immunity, while in our employment, from all risk of impressment from the Confederate States gov't, in view of the engagement of the said Cornett to deliver them to us the 1st of January following, was considered a fair equivalent for their services. We had the use & services of the negroes from the date at which the title to them became vested in us, until they were actually set free through the operation of Gen. Granger's order in 1865. The mules & wagon were deliv'red so soon as purchased. Cannot state the time & circumstances of this last purchase, however, more particularly than I have already done in answer to direct interrogatory 10. We did talk of the
314 effect of the war then waging upon slave property, but I do not think our remarks contemplated any risk, other than that of capture through the invasion of the enemy. It is quite possible, however, our conversation may have involved all the contingencies named, but I cannot now state particularly. I have already answered, in cross-int'y 1, the last two questions of this interrogatory.

Interrogatories & answers of Geo. W. Paschal are as follows, to wit:

Int'y 3d. Did you know anything about a trade for negroes between S. Connett & J. H. & W. H. Williams at any time? If yea, state all that passed in your hearing between the parties at the time the trade was made, both as to the purchase & as the security given.

Ans. to int'y 3. In answer to the third interrogatory the witness says that the trade between Squire S. Connett and William H. & John H. Williams was had at the office and house of the witness. The negotiations lasted a whole day. There was to' much conversation to attempt to give it in detail. It commenced by the exhibition to witness of the title of the Williamses to the league of land No. 4, that being perfect on paper. The witness asked William H. Williams if the debts
315 of his father had all been paid, and he answered that they had. The prices of the negroes had been agreed upon at about $36,000, and the question was as to the sufficiency of the land as security. The

witness stated to the parties that if the United States should succeed in the war the negroes would be free, to which the vendees replied "they were willing to risk that," and that Connett would have to risk the burning of the mills by the Federals. The original understanding between the parties had been that half the purchase-money should be paid in cash. As I said, the negotiation was attended with difficulties. I invited the parties to dine with me, and at my house suggested that the time for the credit should be lengthened, and that one-fourth should be paid in cash instead of one-half. The parties left my house to meet at my office at candle-lighting. They there met, and the trade was closed, and I prepared the covenant, which they then signed, which was in Sept., 1863. Afterwards I prepared the deeds and deed of trust and notes, which bear date 1st of January, 1864. I can only say that the Williamses were to run the risk of the title of the negroes, & Connett of the destruction of the property, should the Federals succeed. Much was said about the cash payment, which I suppose is immaterial.

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Cross-interrogatories propounded to Geo. W. Paschal.

Cross-int'y 2. State whether you acted as the att'y of Squire S. Connett in the negotiation & sale of certain negroes & other property to John H. & W. H. Williams, and state whether that relation existed between you & Cornett at the time you had any conversation which you may say you had with the plaintiff in this suit, & which conversation.

Answers to cross-interrogatories.

Ans. to X-int'y 2nd. In answer to the second X-interrogatory he states that in examining the titles of the Williamses, and in conducting the negotiation about the negroes and writing the conveyances, he acted as a counsel of Connett, and was paid by him. At the time of his conversation with the plaintiff he was the attorney and solicitor of Connett, and he called upon Henry Williams because he had told William H. Williams, at the office of the witness in New York, that if he asserted his title to the land he would sue him for title in Maryland; and I may here remark that Henry Williams had doubtless been told of that threat, as he adverted to it in his conversation. I had but the one conversation with the plaintiff.

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Thereupon the court charged the jury as to the effect of said deed of trust to Wildbahn, and the title held under it, as follows:

"On the 1st day of January, 1864, W. H. Williams & J. H. Williams executed a trust-deed to Isaac Wildbahn, to secure $27,000 due to S. S. Cornett, on certain notes given for slaves sold by him to them, in Texas in September previous. In 1867 Cornett appointed new trustees to this trust-deed, under the provisions thereof, and those trustees, to raise the amount due on the notes, sold the property to S. S. Cornett and gave him a deed therefor, dated June 18th, 1867.

"With regard to the trust-deed under which this sale was made, I instruct you, gentlemen, that if you believe that Cornett brought the slaves from Missouri in August or September, 1861, during the war, for the purpose of disposing of the same, he being a citizen of Missouri, that it was an unlawful act on his part, contrary to his duty as a citizen of the United States, and of Missouri, and his sale of the slaves here was a transaction void in law, and cannot be enforced in

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the courts. And if the consideration of the trust-deed was illegal and void, the deed itself was void, and no title can be derived under it by Cornett, for whose benefit it was executed."

To which the defendants at the time excepted, and now tender in open court this their fifth bill of exceptions, and ask that the same may be signed, sealed, and made a part of the record; which is accordingly done.

JO'S P. BRADLEY, [SEAL.]
Asso. Justice Sup. Co. U. S.

319 Defendants' sixth bill of exceptions is endorsed: "Filed June 13th, 1872. M. Hopkins, clerk." And is in the words, to wit:

Defendants' 6th bill of exceptions.

In U. S. circuit court for the western district of Texas, sitting at Austin. Law side. June term, 1872.

H. H. WILLIAMS
vs.
J. D. NASH ET ALS. } No. 1054.

Be it remembered that, on the trial of the above cause, after the defendants had offered their chain of title in evidence, as set forth in their fifth bill of exceptions, and which, to prevent repetition, is not again set forth herein, but for which reference is made to said fifth bill of exceptions in this record, and offered the evidence of Geo. W. Paschal, as follows:

Law side. In U. S. circuit court, at Austin, Texas.

H. H. WILLIAMS
vs.
J. D. NASH ET ALS. } No. 1054.

Interrogatories for G. W. Paschal, s'r, at Washington City, Dist. of Columbia.

Int'g 1st. Are you acquainted with the parties to this suit, and do you know its object, its origin, and its present condition? If yea, please state if you ever, at any time, had any conversation with the plaintiff, H. H. Williams, in relation to this suit; and if yea, state where it was, and when, and all that passed between you.

320 In the circuit court of the United States for the western district of Texas, at Austin.

HENRY H. WILLIAMS
vs.
JOHN D. NASH ET ALS.

Be it remembered that, on this 30th day of December, 1868, at the city of Washington, in the District of Columbia, personally appeared before me, John S. Hollingshead, a notary public in and for said District, GEO. W. PASCHAL, the witness in the annexed and enclosed in-

terrogatories named; and the said Geo. W. Paschal being by me duly sworn to make true answers to said interrogatories—

In answer to the first interrogatory the witness says that he knows the parties, the object, origin, and present condition of the suit; that, in the month of May of the present year, in the city of Baltimore, in the State of Maryland, the witness had a conversation with Henry H. Williams in relation to his claim to the league of land in controversy, and concerning the litigation in regard to it. The substance of that conversation was that the witness stated to Mr. Williams that he wanted to know the nature or ground of his claim to the land,
321 and what title he asserted to it. Mr. Williams at first stated that he had claimed the land, but that Mr. Cornett now had possession of it, and that he did not now claim it. After some further conversation, I (the witness) thought Mr. Williams changed his ground, and seemed disposed to assert his title. He stated that when Samuel St. Johns and Sophia, his wife, had, by the witness as their attorney, brought suit in the United States district court, at Galveston, for some $75,000.00 against Thomas T. McKinney and Sam'l M. Williams, that he, Henry Williams, was absent from Texas, but that his books were in the possession of his agent there, and that, to protect Sam'l M. Williams, Mr. Ballinger had sued in his, Henry Williams's, name, for over $20,000.00; that Sam'l Williams confessed judgment; that he never intended to distress his brother for the debt; but that, after the death of Samuel Williams, he visited Texas, and learned that the heirs of his brother had sold the league of land in controversy to William H. and John H. Williams; that he was informed they had not paid for the land; that he ordered Mr. Ballinger to make out his account
322 on the judgment, and to lay it upon the land, and to have it sold, and buy it in for him; that that was the character of his claim; that, as Mr. Cornett had given nothing but negroes for the land, he, Henry Williams, thought that he ought not to claim it all; but that some of it should be paid to the creditors of W'm H. and Jno. H. Williams, as some of their debts ought to be paid, bankruptcy or no bankruptcy; that he cared nothing about the property himself, and had authorized W'm H. and Jno. H. Williams to use a deed of trust of his to compromise with Mr. Cornett; and, since Cornett got possession, he had instructed his sons to leave the property and come home.

And after the defendants had offered the petition, schedules, and adjudication in bankruptcy of J. H. & W'm H. Williams, the register's deed to the assignee, and had showed the date of their adjudication in bankruptcy to be the day of October, 1867, and from their schedules had shown the following list of debts to be due; which debts, as they appear on the Schedules "A" of W. H. & J. H. Williams, are as follows:

323 SCHEDULE "A," (1.)

IN THE MATTER OF
W. H. & J. H. WILLIAMS, BANKRUPTS.

Statements of all creditors who are to be paid in full, or to whom priority is secured according to the provisions of the 28th section of said act.

Order of payment preferred claims.	Reference to ledger or vouchers.	Names of creditors.	Residences and occupations.	Amount.	When and where contracted.	Nature and consideration of the debts, & whether contracted as copartner or joint contractor, &, if so, with whom.
1.—Debts due the United States.	.....	.....	.....	.....	.....	Nothing under this head.
2.—Debts due the State of Texas.	.....	.....	.....	.....	.....	Nothing under this head.
3.—Wages due clerk	L. A. (B.) Folio 86	A. Dumars.....	Bastrop Co....	837 66	.....	Services rendered.
Scnout & Co., to an amount not exceeding $50.00.	" 124	Jno. Van Wagner..	Account.....	213 00	.....	Services rendered.
For labor performed within 6 months.	" 100	J. A. Harper.....	Miller	146 15	.....	Services rendered.
Other debts prefer'ed by said act.	.....	.....	.....	.....	.....	Nothing under this head.

SCHEDULE "A," (2.)—*Creditors holding securities.*

Reference to ledger, names of creditor, or voucher.	Residence & description.	When and where contracted.	Value of securities.	Amount of debts.
L. F. N. B. 98 J. Wight Williams.	Bastrop Co..... 1st mortgage May 21st, 1866, cotton crop for year 1866. 2d mortgage, Aug 10, 1866. All mules, oxen, and wagons on premises; number of mules, 30; number of oxen, 6 yokes; number of wagons, 5; wagons, and parts of wagons, 3. 3rd mortgage, Jan'y 15, 1867. *Productions of saw-mill, consisting of a mixed lot of lumber & shingles. supposed to be of the value of about.....	In Bastrop Co....	Supposed to be about 18 bales of cotton, balance destroyed by fire unginned.	9,986 35 $1,000 00

324 *This lot of lumber and shingles, together with 28 mules, 2 wagons, and 5 yoke of oxen, and cotton above mentioned, was levied on by the sheriff of Bastrop County, on the 15th day of February, 1867, by virtue of two executions, one in favor of Ham White, and the other Willis Avery.

SQUIRE S. CONNETT, *State of Missouri:*

On the 8th of February, 1864, petitioners executed to Squire S. Connett their joint and several note' for the sum of $9,600.00, with 10 % interest from the 1st day of January, 1864, and due 30 days after date, 9,600.00.

On the same day petitioners executed to the said Connett their three several notes for $9.170 each, due three, four, and five years after date respectively, all bearing date the 1st day of January, 1864, with interest from date, at the rate of 10 % *cent.* @ annum, 27,510.00.

These notes were given for the purchase of 39 negroes and a wagon and mules valued at $600.00.

To secure the last three notes a deed of trust was given upon a league of land in Bastrop Co., granted to S. M. Williams, and on which petitioners were then residing. On first note suit was instituted in U. S. district court at Austin, and judgement obtained. The land above mentioned was sold under said judgement by Connett and purchased by him, for a nominal sum. Subsequently the same land was sold under a deed of trust, and purchased by said Connett. At a prior date a judge-
325 ment was rendered in the district court of Bastrop County, in favor of Lynn and Williams, for the sum of $15,175.00, and transfer'ed to H. H. Williams, of Baltimore. For statement of character of title to said league of land, see Schedule B, form 1.

HENRY H. WILLIAMS,
Baltimore, Maryland, 14 McCullock st.

Judgement rendered Dec .10, 1866, in district court of Bastrop County, in favor of Lynn & Williams, and transfer'ed to H. H. Williams, 15,175.36.

SCHEDULE A (3.)—*Creditors whose claims are unsecured.—Open account.*

References to Ledger and voucher, L. A., (O. B.)		Names of creditors.	Residence.	Amount.	
Folio	346	A. H. Cook	Austin C'ty	287 00	Indebtedness prior to Jan'y, 1864.
"	351	G. Warren	Bastrop Co	67 66	" " M'ch, 1863.
"	352	Mrs. A. E. Parsons	Travis "	69 52	" " July, 1865.
"	354	Est. S. M. Williams	Galveston	1,679 85	" " 1865.
"	363	J. R. Nichols	Bastrop Co	218 95	" " Jan'y, 1862.
"	485	John Russell	Not known	6 98	" " Sept., 1864.
"	491	M. B. Mathews	Colorado Co	29 78	" " June, 1865.
"	493	A. W. Moore	Bastrop Co	782 66	" " Jan'y, 1864.
"	499	J. H. Gillespie	" "	7 00	" " " 1866.
"	502	C. B. Garwood	" "	40 00	" " June, 1865.
"	503	Joseph Vagee	Caldwell "	31 01	" " "
"	504	Laban House	Bastrop "	3 92	" " July, 1865.
"	507	J. P. McKinney	Travis "	14 93	" " Jan'y, 1866.
326					
"	633	P. C. Tucker	Galveston	418 50	Incurred prior to Jan'y, 1865.
"	374	J. W. Gooman	Bastrop Co	25 50	" " " 1865.
"	379	William Wood	Webberville	4 62	" " " Nov, 1863.
"	386	J. C. Higgins	Bastrop Co	174 00	" " " Oct., 1861.
"	387	W. H. Gilbert	Webberville	1 75	" " " " "
"	388	T. B. Rector	Hays Co	40 00	" " " " 1862.
"	390	Hugh Barton	Bastrop Co	5,375 92	" " " Jan'y, 1865.
"	390	H. W. Dischama	Houston, Tex	1 65	" " " Aug., 1861.
"	391	Rev. Hughes		9 00	" " " Sep., 1861.
"	393	A. & S. Sutor	Austin City	92 20	" " " Oct., 1862.
"	394	George Blitch	Bastrop Co	31 42	" " " Nov., 1862.
"	394	Peter "	" "	28 46	" " " Oct., 1862.
"	403	Antoine Young	" "	34 53	" " " Jan'y, 1865.
"	409	Samuels & Munson	Travis "	25 00	" " " Feb'y, 1864.
"	411	Jacob Rarensburg	Bastrop	16 27	" " " June, 1864.
"	418	Jno. N. Williams	" Co	66 76	" " " Jan'y, 1866.
"	421	H. Sittigast	Travis "	89 90	" " " June, 1865.
"	468	Levi Moore	Bastrop "	59 49	" " " Jan'y, 1863.
"	164	Ch's Sauls	Williamson Co	15 00	" " " Jan'y, 1866.
"	164	E. D. John	Galveston	3 50	" " " " "
"	164	W. Waunan	Not known	1 00	" " " " "
"	164	B. C. Stroud	" "	4 44	" " " " "
"	164	A. T. Nodan	" "	7 90	" " " " "
"	164	A. Ruthman	Austin City	114 50	" " " " "
		NOTES:			
"	89	F. A. Bauman	Houston	1,507 10	Two notes for services rendered.
"	89	Stephen Wochl	Bastrop Co	282 65	One note for services rendered.
"	89	H. & S. M. Williams		3,543 58	T. J. League, Galveston, agent.
"	89	J. R. Nichols	Bastrop "	5,000 00	One note, dated Sept., 1862.
"	88	W. J. Wilson	" "	103 39	Bal. on note.
"	88	Cha's Johnson	San Antonio	300 00	Due July 1, 1862.
"	88	D. Neil		75 05	Dated May 28, 1861.

SCHEDULE A (3.)—*Continued.*

References to ledger and voucher, L. A., (O. B.)	Names of creditors.	Residence.	Amount.	
" 88	Elma White	Bastrop Co	720 00	
" 88	S. Connett	Missouri	600 00	
" 88	T. S. Wilson	Bastrop Co	66 03	
327				
" 88	W. Puryear	Bastrop Co	126 67	In schedule, W. H. Williams, date June 24, 1861.
" 88	W. Avery, s'r	Williamson "	60 00	Judg'nt dist. c't B. Co.
" 88	" " "	" "	315 00	" " " "
" 88	Margaret Avery	" "	225 00	Draws interest fr. Aug. 18, 1864.
" 88	Harry White, dec'd	Bastrop "	720 00	J'dgm't Bastrop Co. dist. c't.
" 88	C. Harmans	Fayette "	541 80	" " " "
" 88	W. Avery, sen't	Williamson "	255 00	" " " "
" 88	" " "	" "	225 00	" " " "
" 88	Margaret Avery	" "	90 00	Interest Nov. 20, 1864.
" 88	C. Harman	Fayette "	381 25	J'dgm't Bastrop Co. dist. c't.
" 89	Joseph Nicholson		60 03	Offset by Ja's Woods.
" 89	Augustus Bamson	Bastrop Co	226 78	
" 89	W. B. Bryant	" "	200 00	
" 89	A. N. Cook	Travis "	500 00	Offset by Christi'n & Loomis.
" 89	T. W. Ward	" "	55 88	
" 89	T. W. Avery	Williamson "	111 56	
" 164	Gastor Banks	Webberville	72 00	Incur'ed prior to Jan'y, 1866.
" 164	N. T. Rector	Travis Co	4 00	" " " " "
" 164	M. C. Burdett	Austin, Tex	9 48	" " " " "
" 164	A. Hensinger	San Antonio	42 00	" " " " "
" 164	P. Farehand	Bastrop Co	14 75	" " " " "
" 164	H. Gusbee	Austin, Tex	4 50	" " " " "
" 164	J. B. Reid	Not known	8 00	" " " " "
" 164	Barnett	Bastrop Co	25	" " " " "
" 164	Jordan Smith	Perryville	8 11	" " " " "
" 164	John McDuff	Bastrop Co	4 70	" " " " "
" 164	Frank Weiser	Not known	6 15	" " " " "
" 164	Jno. Clement	" "	6 00	" " " " "
	Cushman, Johnson & Stanley.	Houston	1,424 54	Acc't of same with papers confederate currency.
	Cushman, Johnson & Stanley.	"	568 80	Acc't of same with papers confederat currency.
	Lynn & Williams	Galveston	1,008 01	Proceeds of 54 bales of cotton shipped by W. H. & J. H. Williams for their acc., less charges and interest of W. H. & J. H. Williams, in same amount unadjusted.
	" "	"		

328 And after the def'ts had introduced the original petition and note of J. H. and W. H. Williams for about $9,000, payable to S. S. Connett, dated Feb'y, 1864, on which the judgement for $12,584 was rendered on the 9th day of Feb'y, 1867, as appears from the fifth bill of exceptions in this case.

And the defendants having also introduced the deposition of A. M. Williams, as follows:

In United States circuit court, at Austin, Texas, Jan'y term, 1868.

H. H. WILLIAMS
vs.
JNO. D. NASH, JOHN VAN HAGAN, ET AL. } No. 1054.

Interrogatories to Austin M. Williams, who lives in the county of Brazos, Texas.

1st int. Are you acquainted with the parties to this suit, and do you know its object; and do you know what land, if any, is in dispute? If yea, what land is it; where situated; who was the original grantee; and

in what manner, if at all, were you related to said grantee? and, if you say you was his son, state how many children he left surviving him, if he is dead, and their names.

329 2nd int. Do you know whether the wife of S. M. Williams, the original grantee, and the father of his surviving children is alive? If yea, where does she live; and if dead, when did she die, and where?

3rd int. In what year and month did S. M. Williams die, if he is dead, and what was the condition of the estate of S. M. Williams at the time of his death, as to solvency and assets? How did its assets compare with the debts?

4th int. If you say the estate was solvent, state, if you know, if there was ever any division or partition of all or any part of the estate of said S. M. Williams. If yea, state what portions of the estate was so sold or divided, and amongst whom. If you say among the children of the said S. M. Williams, state if any real estate in the county of Galveston was so sold and divided as part of the said estate; and if yea, state what portion in Galveston was so divided, and to whose share did it fall?

330 5th int. About what year and month did said agreement and partition, if there was any such agreement, take place? Fix its real date, as near as you can; and, if you say that in pursuance of said agreement deeds passed, how long did the agreement ante-date the deeds, if at all?

6th int. In such partition among the parties named was any disposition made by them of the league of land in Bastrop County originally granted to S. M. Williams? If yea, state how, when, and by whom was it so transfer'ed or disposed of, and to whom, and on what consideration; and state all the facts in this connection, and state your connection fully with the matter; how many deeds and instruments were made, and what became of the first original instrument executed as to the league.

7th int. If in answer to the foregoing question you say there was an agreement among the heirs as to the partition of the estate, please, in answer to this, state fully the particulars of such agreement; who were the parties to it; its date and object, and state the property that

331 fell to each; and in speaking of an agreement to partition, this inquiry is directed to the original agreement, if there was one, made prior to 1863, or some time anterior to that date. Was there any writing of it preserved? and if there was, and you have the original, please attach it, or, if you have a copy, attach; or, if you know where the original is, state all about it, and also state fully its contents.

8th int. Who had possession of the S. M. Williams league on the Colorado River, above Bastrop, in 1858 and 1859, and who first took possession of it; and give the month, day, and year, and state the names of the persons taking possession of it, and in what right and by what authority. Give all the facts concerning the possession.

9th int. Who was the administrator of the estate of S. M. Williams at the date when possession was taken of the league in question; and state if you happen to know any facts going to show that they

332 had a knowledge, or the contrary, of the partition of said estate, and if the sale, by the children of their intestate, of the Sam. M. Williams league in Bastrop County, Texas, be full on this point.

10th int. State all you may know about the facts connected with a real or supposed debt said to be due from S. M. Williams' est. to the pl'tiff, H. H. Williams. State all you know on this subject, and be as full and complete as possible, and state all y'r means of information.

11th int. If in answer to any of the above interrogatories you say

anything about a purchase of the said league above inquired about by one Jno. H. Williams, state what relation is said Jno. to you, and what relation is he to the pl'tiff in this suit? Was the said John then acting in his own right, or as agent for some other person, and if the latter, for whom? Did the said Jno. H. Williams say anything about the source whence the money was to come to pay for the said league? If yea, from whom was the money to come? State all you may know, if you know anything as to the connection of H. H. Williams with this purchase, and give all the sources of y'r information.

HANCOCK & WEST,
Def'ts' Attorneys.

333 Cross-interrogatories to the witness, Austin M. Williams.

X-int. 1st. If, in answer to the 3rd direct interrogatory, you have said that you know anything about the solvency and assets of your father', Samuel M. William's, estate, did you really know, of y'r own knowledge, what amount of property was owned by him, or its real value? Please state how you could know what amount S. M. Williams owned, or was liable for, at the date of his death. Could you, or any one else, with any certainty, tell at the time of his death, or for several years thereafter, whether his estate was solvent or not?

X-int. 2nd. If, in answer to the 4th direct interrogatory, you have said that you know anything about the division of any part of the estate of S. M. Williams, how was it done? By any order of a probate court? If so, what court? Was such division reduced to writing?

X-int. 3rd. If, in answer to any of the direct interrogatories, you have said there was any division of the estate of S. M. Williams, and
334 particularly of the league of land mentioned in the 5th & 6th direct interrogatories, please state if H. H. Williams, the plaintiff in this suit, was a party to it. Did he sign any paper or agreement in reference to said league of land? If so, attach to your answer to this interrogatory said paper, or a copy of it, if you have it; and, if not, please tell where it can be found.

X-int. 4th. Were you on the land referred to in 8th direct interrogatory in the years 1858 or 1859, or 1866; and if so, in which of them? Was not that league of land the property of the estate of S. M. Williams during the year 1866?

X-int. 5th. If, in answer to any of the direct interrogatories, you have stated anything that Jno. H. Williams may have said or done, state w'ether or not the plaintiff, H. H. Williams, was present or not; and whether Jno. H. Williams had any power of attorney from the plaintiff to act for him.

CHANDLER, TURNER AND CARLETON,
Att'ys for Plaintiffs.

H. H. WILLIAMS
vs.
JNO. D. NASH ET AL.

335 In obedience to the foregoing and attached commission, AUSTIN M. WILLIAMS, the witness therein named, personally appeared before me, at my office in the town of Bryan, on the 7th day of January, A. D. 1869, and, having first been sworn by me, in answer to the foregoing and attached interrogatories propounded to him, deposes as follows:

In answer to the 1st int. To the first interrogatory witness answers that he is acquainted with the plaintiff and one of the defendants, Jno. D. Nash; that he knows the object of the suit and the land in controversy, and states that it is league No. 4; is situated eight miles above Bastrop; that Samuel M. Williams was the original grantee. Witness further states that he is the son of S. M. Williams, the original grantee, and that his father left four surviving children. Their names are A. M. Williams, W. H. Williams, Mary D. Williams, and Caroline L. Williams.

In answer to 2nd int. To 2nd interrogatory witness answered that the wife of S. M. Williams, the original grantee, and the mother
336 of his surviving children, is dead, and that she died in Bastrop, in the year 1860.

Answer to 3rd int. To 3rd interrogatory witness answers that S. M. Williams died in the month of September, 1858, and that his estate, at the time of his death, was solvent.

Answer to 4th int. To the 4th interrogatory witness answers that there was a division or partition of the estate of S. M. Williams among his surviving children, but does not know what portion each child got. Witness states that there was real estate of the said S. M. Williams in the county of Galveston, and that it was divided among his heirs, that is, his surviving children, but does not know what were the proportionate shares of each child.

Answer to 5th int. To interrogatory 5th witness answers that the said partition took place about the first of April, 1866, and that the deeds passed at the time of the partition or division.

337 Answer to 6th int. To interrogatory 6th witness answered that in such partition or division among the parties named there was no disposition made of the league of land in Bastrop County originally granted to S. M. Williams, as the same had been disposed of previous to said partition or division by the said heirs; that A. M. Williams, Mary D. Williams, the wife of T. J. League, and Caroline L. Williams, the wife of Marcus Campbell, all sold their interests in said league to W. H. Williams. The witness further states that he does not remember the number of instruments that were made, and does not know what became of the original instruments executed as to this league.

Answer to 7th int. To interrogatory 7th witness answered that he knows of two original agreements of the partition of said estate prior to 1863, but says all he knows in relation to the partition took place in 1866, when the said estate was divided or partitioned out among the heirs, each receiving his or her portion according to his or her account with the administrator.

338 Answer to 8th int. To interrogatory 8th witness answered that he had possession of the S. M. Williams league, on the Colorado River, above the town of Bastrop, in the year 1858 & 1859; that he, A. M. Williams, first took possession of it in the month of April, 1855, in the right and under the authority of his father, S. M. Williams.

Answer to 9th int. To interrogatory 9th witness answered that at the time he took possession of the said league, his father, S. M. Williams, was living.

Answer to 10th int. To interrogatory 10th witness answered that he knew of no facts connected with any real or supposed debt due or said to be due from S. M. Williams to the pl'tiff, H. H. Williams.

A. M. WILLIAMS.

Answers to the cross-interrogatories.

Answer to the 1st X-int. To the 1st X-interrogatory witness answered that he did not know of his own knowledge what amount of property was owned by his father Samuel M. Williams, or its real value,
339 but says that the estate must have been solvent, else there would have been no assets for division or partition among the heirs.

Answer to the 2nd X-int. To the 2nd X-interrogatory the witness answered that the division of the estate of the said Samuel M. Williams was made by the heirs themselves, but does not know whether it was done in accordance to any order of the probate court; that said division took place in the county of Galveston, and that it was reduced to writing.

Answer to 3rd X-int. To 3rd X-interrogatory witness answered that H. H. Williams was not a party to the said division of S. M. Williams' estate; that the said H. H. Williams signed no paper or agreement, so far as he knew, in reference to said league of land.

Answer to 4th X-int. To the 4th X-interrogatory witness answered that he was on the land referred in the 8th direct interrogatory in the years of 1858 & 1859, in the right and under the authority of his
340 father, S. M. Williams; and that he was also on the land in 1866, in the character of a mere visitor, but that he took possession of the said land in the year 1855, by the authority of his father, S. M. Williams, and that he held possession of it in his father's right up to his death, which took place in 1858; and that the administrator of his father's estate continued him possession until October, 1860; and that after that period the same was sold to W. H. Williams, one of the heirs, by him, the witness, and the other heirs, his two sisters Caroline L. and Mary D. Williams.

Answer to 5th X-int. To cross-interrogatory 5th witness answered that he knew of nothing that H. H. Williams said or done in reference to this league of land; that he knew of no power of attorney that John H. Williams had from the pl'tiff to act for him.

A. M. WILLIAMS.

The plaintiffs also proved that the def'ts had committed damages on the land to the amount of $5,000, and had also introduced the evidence of W. H. Williams, as follows:

341 *Testimony of W. H. Williams.*

In the U. S. circuit court for the western district of Texas, sitting at Austin.

H. H. WILLIAMS *vs.* J. D. NASH ET ALS. } No. 1054.

Interrogatories to W. H. Williams, of Galveston County, Texas.

Int. 1st. Are you acquainted with the parties to this suit, and do you know its object? If yea, state its object, and how and in what manner, if you know, did the plaintiff procure or obtain his pretended title; and state where the land lies, if you know.

Int. 2nd. If you say the plaintiff obtained his pretended title by means of a purchase made at an administrator's sale, please state who was the

administrator and whose estate was it, and how was the sale made, and who was acting, if any one, as agent for the plaintiff at the time of said sale, and if you say J. H. Williams was, please say where was J. H. Williams living at the time the sale took place; and if you say he was living on the land in suit at the time, please state what induced
342 J. H. Williams to have his home sold, and all the facts fully in your knowledge on this point; and state your means and sources of information.

Int. 3rd. If you say the sale was gotten up and made in pursuance of a plan concocted by the said J. H. Williams to avoid the payment of his debts, state all the particulars of the scheme. State when it was first conceived, and state the different steps by which it was carried out—detail it fully; and, if in the detail you state he found it necessary to use the machinery of the probate court, at Galveston County, state how he did this, and what relation did you occupy to the estate; and, if you say to carry out his scheme it was found necessary to resurrect and *and* galvanize a certain old debt that had long since been forgiven, state fully all the facts as to how this was manifested, and give a full account of the modus operandi by which the fact was supposed to be accomplished; and, if you say you declined to play any part in
343 the fraud, state how you were gotten rid of; and, if you say you were removed from or resigned the administratorship, state what induced you to do it, and why did you decline, if you did decline to take any part in this matter of the sale of the land in suit. Give a full history of all the matter, detailing the facts, the dates, the places, and the names of the different persons.

Int. 4. If you say these matters were done in relation to the estate of S. M. Williams, deceased, please state who are the children of S. M. Williams, if he had any. Name them all; and, if any are females and married, name them, and also their husbands. And state, if you happen to know, the name of the wife of S. M. Williams, and whether she died before or after the said S. M. Williams. What relation are you, if any, to the said S. M. Williams, to the said H. H. Williams, and to the said J. H. Williams? Are any of the children dead, name them.

Int. 5th. What was the condition, so far as you know, pecuniarily
344 of the estate of S. M. Williams, deceased, at the time of his death; and if you say in this connection that it was solvent, please state how much did its assets exceed its liabilities. And state all the facts going to show its true condition as to solvency or insolvency at the time of the death of the said S. M. Williams, deceased. Be full and particular on this point.

Int. 6. If in this connection you should happen to say that the estate was regarded as so solvent that a partial partition of said estate was had among the heirs of the real estate, please state the date, and the terms, and the particulars of this partition. On what basis was it made? And state, as near as you can, what real property each heir received—a general description is all that need be given. And if you say some of the heirs got city property in Galveston, state what heirs got it, and what was its value at the date of the partition, and where is it situated in Galveston, and also, what was its value in 1866 and 1867;
345 and also, in this connection, state to whom in this partition did the land in suit fall, and how was his title made? State all the particulars as to how the estate of S. M. Williams was partitioned, and how were its debts paid.

Int. 7th. State all the facts in your knowledge as to when (if at all) the heirs of S. M. Williams (or some of them) first went into actual possession of the land in suit; give the year and month, and all the

facts as to the possession; and state all who held it after, and about this time, and state how each claimant acquired title, and how did they hold, stating who held every year from 1858 down to 1868, and the character of their holding and possession.

Int. 8. Who gathered the crops and sold them, and the proceeds of the mill, if any one, during the years 1865, 1866, & 1867? Be full and particular, and state about what were the crops made each year, and what became of them for each year, that is, for 1865, 1866, and
346 1867. If you say that, for some purpose, in the year 1867, or at any other time before or after that date, he, the said J. H. Williams, pretended to hold for the plaintiff H. H. Williams, state in what month and year did he first set up this pretext and why did he trump it up and hatch it out. If it was done at all, state all the acts and maneuvres by which he managed to change the character of his tenancy; and if, in this connection, you state that the said J. H. Williams held a power of attorney from H. H. Williams, state all you know on that subject.

Int. 9th. State, if you happen to know, all the different acts of the said J. H. Williams, going to show the true character of his holding said land; and if you say he used the crops and the proceeds of the mill for himself, state how you know this to be the fact; and state fully all the facts in your knowledge going to show that J. H. Williams was holding for himself or the contrary. State all the facts fully and minutely on this point.

347 Int. 10th. Please state, if you know, what character of improvements were on the place in suit, (if any,) at the time that it was sold by the administrator and purchased by the plaintiff. If you say there were dwelling-houses, a mill, machinery, fencing, &c., say what was the value of the improvements, and who was living on it; and state if any one acted as the agent of the plaintiff at the sale, and bid the property; and, if you know, state who did bid it off.

Int. 11th. Please state if you ever knew this tract of land in suit to be sequestered, and seized, and taken possession of by any one; and, if so, when and in what suit. If you say it was taken possession of by the United States marshal, under a writ of sequestration, state how long did the marshal hold it, and who if any one replevied it; and, if you say that the plaintiff failed to replevy, state the facts on this point, and why did he not replevy; and if, in this connection, you say that the place was replevied by others, to whom was the possession given by
348 the United States marshal; and if you say to Hancock and West, please state when did they receive possession from the marshal, and to whom did they then turn it over.

Int'g. 12. Please state any other fact in your knowledge that will throw any more light on the matter in controversy; and if in answer to the above interrogatories anything has been omitted or you desire to make further explanations, please state such matters fully in answer to this interrogatory.

HANCOCK & WEST,
Def'ts' Attorneys.

It is agreed that a commission is waived, & that the witness may appear before any officer authorized by law to take depositions, and answer the above interrogatories & annexed crosses, & return the same, waiving all objections as to mere form, & reserving all objections as to the competency & relevancy of the evidence.

CHANDLER & CARLETON,
Attorneys for Plaintiffs.

JAN'Y 6TH, 1872.

349 H. H. WILLIAMS } No. 1054.
vs.
JOHN D. NASH ET AL. }

Suit pending in the U. S. circuit court, western dist. of Texas, sitting at Austin.

The plaintiff excepts to the following portions of the direct interrogatories propounded by the defendants to the witness W. H. Williams and the answers thereto, to wit:

1st. All that part of the first interrogatory that seeks to prove by parol testimony the manner in which plaintiff procured or obtained his tittle to the land in controversy.

2nd. So much of the second interrogatory propounded by defendants as seeks to prove by parol testimony the sale and purchase of the land involved in this suit at administrator's sale, and to whose estate the land in question belonged, because there is in existence documentary evidence of such facts, if they be true. Plaintiff also excepts to the remainder of said second interrogatory, because the questions propounded seek to elicit illegal and irrelevant testimony.

3rd. So much of the sixth interrogatory propounded by defendants as seeks to prove by parol evidence title that may have been made between the heirs of S. M. Williams, deceased, because each and
350 all of said questions are illegal and irrelevant, and the answers thereto inadmissible in this cause, and because the title-deeds are better evidence. Wherefore the pl'ff asks that so much of said interrogatories as are referred to in the above and foregoing exceptions be suppressed and stricken out, and should the plaintiff's exceptions be overruled by the court, then pl'ff propounds the following cross interrogatories to said witness W. H. Williams:

Cross-interrogatories to W. H. Williams.

Cross-int'g. 1st. If, in answer to the first direct interrogatory, you have stated that the plaintiff obtained his title to the land in controversy by purchase at an administrator's sale, please state whether or not you were present when the sale was made. Do you know, of own knowl-
351 edge, that John H. Williams bid off said land as agent of H. Williams? If you have stated that John H. Williams had any inducement to have the land sold, do you know that the plaintiff H. H. Williams had any knowledge of the reasons which actuated the said Jno. H. Williams? Do you know that the plaintiff H. H. Williams was privy to or had any connection with the said Jno. H. Williams in anything that you may have stated that he did, in order to get said land sold?

Cross-int. 2nd. In each and all the questions that you may have answered to the 3rd direct interrogatory in the affirmative, do you know that the plaintiff H. H. Williams ordered the said Jno. H. Williams so to act, or that H. H. Williams had any knowledge of any one or more of the acts of the said Jno. H. Williams prior to or at the time you may have stated that the said Jno. H. Williams committed said several acts, or any one of them?

Please examine a copy of a letter hereto attached, marked "Exhibit A," dated Dec. 15, 1868, and singed W'm H. W., and please state
352 if it is not true that it is a substantial copy of a letter that you wrote, and addressed or delivered to Jno. H. Williams on the 15th Dec'r, 1868? If you did write such a letter, are not the statements in

said letter true? If you ever wrote a letter containing the statements set out in Exhibit "A," are they not true? If not, please state what part of it is untrue. Was not T. J. League, esq., the att'y of H. H. Williams in prosecuting his claim in the probate court of Galveston County, and in procuring an order to sell the property of the estate of S. M. Williams, and is it not true that the said T. J. League filed a petition in said probate court, praying for an order to sell property of the estate of the said S. M. Williams to pay the debt of pl'tiff?

Cross-int. 3rd. Please state, if you know, when S. M. Williams contracted the debt with the plaintiff H. H. Williams that the land in controversy was sold to pay. Please state the year. If you cannot state the year, please state how far back you heard of it. Did you not hear or know of the debt prior to 1850?

353 Cross-int. 4th. Did not the estate of S. M. Williams consist mostly of lands unimproved situated in different parts of the State? Is it not true that the lands belonging to S. M. Williams could not be sold in 1866, '68, '69 for enough to pay the debts against the estate? Is it not true that the estate of S. M. Williams owed a large debt in New Orleans, that the estate was forced to meet promptly, which rendered indulgence from other creditors of the estate grateful if not absolutely necessary?

Cross-int. 5th. If, in answer to the 7th direct interrogatory, you have stated when the heirs of S. M. Williams took possession of the land, is it not true that the heirs of S. M. Williams, or any one of them, did not take possession of the league of land in controversy in their own right as heir or heirs prior to the date of the pretended deed or deeds of a part of the heirs of S. M. Williams to you?

Cross-int. 6th. If you have answered any of the questions propounded to you in the 8th direct interrogatory, then state is it not true
354 that after the plaintiff H. H. Williams bought the land sued for in this cause, that he was anxious for the firm of W. H. & J. H. Williams to pay their debts and support themselves and families? Also, state whether or not H. H. Williams was not a wealthy man, and well able to aid the firm of W. H. & J. H. Williams. If you have stated anything about J. H. Williams having acted as agent for H. H. Williams, then state whether or not he was the general agent for H. H. Williams for all his H. H. Williams' property and interest in Texas; and also state, if you know, whether or not H. H. Williams had and has valuable property and claims in Texas, besides league No. 4 in Bastrop County.

CHANDLER AND CARLETON,
Attorneys for Plaintiffs.

Answers of W. H. Williams to direct and cross-interrogatories propounded in the above-entitled cause.

Ans. to 1st int'y. I know H. H. Williams and J. D. Nash,
355 but who et als. are I do not know. I do not know the gents' object unless it be to get possession of league No. 4, in Bastrop County, about eight miles above town of Bastrop. I do not know, but am informed, that the plaintiff acquired his title from sale out of probate court of Galveston County.

Ans. to int. 2nd. League No. 4 was claimed by the estate of S. M. Williams, and Philip C. Tucker was, at the time of the sale, administrator. I was not present at the sale, and know not how it was made or

who was agent of pl'tiff at said sale. But about this time, J. H. Williams told me that he had H. H. Williams' power of attorney to act for him in all his Texas matters. But I do not know in fact his powers. Jno. H. Williams was living on said league No. 4. I do not know what Jno. H. Williams' object was in suffering the sale to be made.

Ans to int. 3d. In 1862, I was one of the administrators of the estate of S. M. Williams. From about August, 1862, I had, until I was
356 removed, neglected and refused, and intended ever to neglect and refuse, to act as such. I was removed, I am informed, on the application of my coheirs. H. H. Williams held a judgment against the estate. I had never been satisfied. If he got his money the estate was insolvent. If he did not, W. H. & J. H. Williams, creditors, got the league No. 4. Personally, I did not care, in my then state of mind, which. I believe, but I cannot say certainly, that Jno. H. Williams talked to me about securing league No. 4 for his father, but he did not give me the particulars of any plan or scheme to accomplish this purpose.

Ans. to int. 4th. The children of S. M. Williams, at his death, were Austin M. Williams, since deceased; William H. Williams, this deponent; and Mary D. League, wife of T. J. League; Caroline L. Campbell, wife of M. L. Campbell. The wife of S. M. Williams was named Sarah P. Williams, and died after S. M. Williams. I am nephew of H. H. Williams and first cousin to J. H. Williams.

357 Ans. to int. 5th. At the time of S. M. Williams' death his estate consisted of wild lands, the homestead of the family in Galveston, some vacant out-lots, and a half interest in two lots in Galveston City, some eight or nine negro slaves, and some inconsiderable personality. Its chief resources were then regarded to be its wild lands. Its liabilities might have been about $40,000, not including H. H. Williams' judgement, which I suppose they would have been $85,000 or 90,000 dollars. There were about 75,000 acres of land which I valued at $3.00 per acre in those days, and so estimating them, regarded the estate as solvent.

Ans. to int. 6th. There was no partition of said estate prior to April 1, 1867. Before the war I sold $50,000 worth of lands and received about one-fourth cash, with which cash, and borrowed money made by the heirs, the liabilities of the estate, with the exception of H. H. Williams' judgement, were met, and the current expenses of the family and the education of minor child carried on. After the war the lands
358 were practically worthless, and the borrowed money used by the heirs to take up the estate's debts had to be met with interest by all available means still in the estate, which was partly a surrender of lands and purchase-money notes. The land in this suit was never partitioned. It was sold to me by my coheirs without any actual consideration passing except my notes of hand. I have no memoranda of partition made April 1st, 1867, and cannot affix a schedule of what each heir received. I had a copy of said partition, as my title-papers to my distributive share, which I surrendered to my assignee in bankruptcy, at Austin. The debts remaining against the estate after the close of the war were paid, as I was informed, by transfer of purchase-notes, sale of land, and transfer of land, and the judgement of H. H. Williams was paid by sale of the land in controversy in *in* this suit.

Ans. to int. 7th. Austin M. Williams went on the land about 1856, as agent of S. M. Williams, and remained there until about 1860.
359 About 1862 W. H. Williams, this deponent, went on the land under the sale made to him by his coheirs, and remained there until ejected by law. I have no memoranda to give exact dates of the times

refer'ed to, and do not remember them. I sold part of my interest to J. H. Williams, some time in 1863 or '4, and W. N. & J. H. Williams held 'til ejected by law. I was ejected by H. H. Williams, and J. H. Williams was ejected by H. H. Williams, and the land was then held by J. H. Williams as agent of H. H. Williams, and I continued on the land under an agreement, for a salary to be paid per annum.

Ans. to int. 8th. I gathered the crops, and J. H. Williams disposed of them. The old mill was dilapidated, and not run. A new one was put up by J. H. Williams, as the agent of H. H. Williams. I don't know what was done with any of the proceeds. I do not know when H. H. Williams first claimed the land, but was shortly after the war.

360 J. H. Williams claimed to do all his acts about this land as H. H. Williams' agent, of the terms & conditions of which I was not informed, and had no communication with H. H. Williams.

Ans. to int. 9th. I have already stated that I do not know what became of the proceeds of crops and mill, and that J. H. Williams claimed to be the agent of his father, H. H. Williams, and this is all I know about it.

Ans. to int. 10th. The improvements consisted, at the time the place was purchased by H. H. Williams, of open cultivated land—about 450 acres, the old mill, and distillery, dwelling-houses, negro-cabins and fences. The improvements were probably worth $15,000. I and J. H. Williams were living on it at the time. I was not at the sale, and do not know who bid it off, but have heard that M. F. Moth represented the plaintiff, and bid it off for him.

Ans. to int'y 11th. If taken by U. S. marshal in suit of Connett

361 vs. W. H. and J. H. Williams, I do not recollect the date of the sequestration or seizure, or how long the marshal held it. Hancock & West, I believe, replevied the property, as agents of Connett. I do not know why H. H. Williams failed to replevy. I do not recollect when Hancock & West received possession. I think it was in the fall of 1867, and I only know they leased the field to some freedmen, for whom, I believe, J. H. Hooper was agent.

Ans. to 12th int. I know nothing more.

W'M H. WILLIAMS.

Answers to cross-interrogatory propounded by plaintiff.

Ans. to 1st X-int. I was not present at the administrator's sale, and do not know, of my own knowledge, who bid it off, but have heard that M. F. Moth did, and I am not informed of J. H. Williams and H. H. Williams' private understanding between themselves.

Ans. to 2nd X-int. I have already answered that I am entirely in the dark as to the understanding between H. H. and J. H. Williams, and do not know what they knew of each other. I have examined the

362 copy of letter marked Exhibit "A," and recognise it as a substantial copy, so far as I can recollect, of a letter I wrote to J. H. Williams, and believe it, as fully as anything I can say, embraces my knowledge of the subject it refers to. I have said I do not know, of my own knowledge, who was H. H. Williams' attorney in said matter, but am informed that M. F. Moth was; do not know who filed the petition for sale of property.

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358 were practically worthless, and the borrowed money used by the heirs to take up the estate's debts had to be met with interest by all available means still in the estate, which was partly a surrender of lands and purchase-money notes. The land in this suit was never partitioned. It was sold to me by my coheirs without any actual consideration passing except my notes of hand. I have no memoranda of partition made April 1st, 1867, and cannot affix a schedule of what each heir received. I had a copy of said partition, as my title-papers to my distributive share, which I surrendered to my assignee in bankruptcy, at Austin. The debts remaining against the estate after the close of the war were paid, as I was informed, by transfer of purchase-notes, sale of land, and transfer of land, and the judgement of H. H. Williams was paid by sale of the land in controversy in *in* this suit.

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Ans. to X-int 3rd. I don't know when the debt was contracted that the land referred to was sold to pay, or the year when I heard of the judgement founded on this debt—possibly in 1850; but I am only certain of knowing about it since 1854.

Ans. to X-int 4. It did consist mostly of unimproved lands, and, during the years 1866 and 1867, they could not have been sold for the amount of the estate's indebtedness. It did owe a large debt in
363 New Orleans, and was forced to ask indulgence.

Ans. to 5th X-int'y. Answer. Yes.

Ans. to 6th X-int'y. I know nothing of what is asked in this interrogatory of my own knowledge. I don't know much about H. H. Williams' affairs, but suppose he was not in more than in comfortable circumstances. J. H. Williams claimed to be general agent for H. H. Williams, and also claimed to have money interests in Texas in his control as said agent.

W'M H. WILLIAMS.

EXHIBIT A.

Letter attached.—Exhibit A.

PLANTATION LEAGUE NO. 4,
Bastrop Co., Dec. 15, 1868.

D'R SIR: My knowledge of the claim of my uncle, H. H. W., of Balt., M'd, vs. The estate of my father, extends to a few years only prior to my father's death. I paid little attention to it then. After my father's death I enquired of my uncle about it, and was assured it was
364 bona fide. But that he never would press it to the injury of my father's family, and that his attorney, Mr. Ballinger, had sealed instructions to this effect. It was often discussed by myself and co-administrator, Mr. Tucker, of Galveston, in company with my coheirs. We were all in the dark about it; we let it sleep on. One day, however, some time in the year 1859, I think it was, I mentioned the subject to James Love, dep'ty-clerk of dist. court U. S., at Galveston, and think he told me that the execution had expired—of this I am not positive—any way, I went with him and looked at the record of the court, and found either the judgement was barred or would soon be, and in a fit of conscientiousness to which young men are subject at times, ordered the matter to be revived and bill of costs sent to me, which was done, and the said costs paid by me personally, amounting, as near as I can recollect, to $13.50. I heard no more of the matter until after the
365 war, when I was notified that the place we lived on, though sold to me by my coheirs, was to be sold to satisfy the claim. I was a broken-down man. I cared for nothing; thought of nothing, and let the matter take its course. I should have mentioned that since about the fall of 1860, I had, by agreement with the heirs, exercised no right over the estate as administrator, nor received any fees, except on one occasion, an allowance of $500 as expense money. The course of the administration of my father's estate was inaugurated by me. I was prevented, by legal opinions of other attorneys, from following a statute intended to close estates by surviving wife, husband, or partners, under bond, & etc., passed between '51 & '57, and forced to act under law for estate of diseased persons. I found it useless to attempt to settle quickly the pressing matters of the estate under these laws; hence, by agreement, (verbal,) organized a partnership composed of the heirs, and sold lands, with the personal guarantee of each heir, and paid
366 debts with proceeds, and was proceeding satisfactorily and rapidly to the liquidation of all claims against the estate until jealousy, distrust, and war came upon me and closed my career as acting agent. I refused to act as administrator, and was dropped—quasi

dropped—and the estate agency turned over to Mr. League, my brother-in-law. The estate was ample for all debts (save my uncle, H. W. W.,) and to distribute $60,' or $75,000 to each of the former heirs. Land sales amounted under my agency to $58,000; has been realized by the estate upon a portion of its estate which was left to proceed under my plan. It thus appears that the heirs felt the estate solvent, acted as if it was, and sold property of the estate with a guarantee based on the excess of the estate over its liabilities coming finally to them. My purchase of this league was an exception to this plan, simply from bitterness. It was withheld because I was not a stranger to the affairs of the estate, and without confidence in the transaction, ostensibly. I
367 did not press my right to it for certain reasons. I took the land in good faith, without guarantee; sold half of it to you in good faith; united in deed of trust to Mr. Connett to secure the negro trade. I remember making an exhibit to Judge Paschal of the facts of our title, when dealing with Mr. Connett, in his office at Austin. The absence of guarantee and the defect in our title were frankly pointed out, cavalierly it is true, but as cavalierly met. The estate was ample, my word good, my coheirs above suspicion, and right to sell lands one day certainly to be theirs, etc.

Yours,

W'M H. W.

Better enquire into effect of our compromise with the heirs for balance purchase-money for the league. A. M. W. & I will have to testify that they urged the claims, we met them, and that you gave them an indemnity for the transaction, & etc.; at least, this is my impression.

368 I, Edward T. Austin, a notary public for the county of Galveston, do hereby certify that William H. Williams, the witness, whom I know, signed and swore to the foregoing answers to interrogatories & cross-interrogatories, before me, at Galveston, this 24 day of April, A. D. 1872. Given under my hand and notarial seal, this the twenty-fourth day of April, 1872.

[L. S.] EDWARD T. AUSTIN,
N. P. for Galveston, Texas.

The foregoing deposition of W. H. Williams is endorsed in words, to wit: "H. W. Williams vs. J. D. Nash et al. No. 1054. Deposition of William H. Williams. To the clerk of the circuit court of the United States for the western district of Texas, Austin City, Travis C'ty, Texas. Opened by consent, 2nd May, 1872. H. & West, Chandler and Carleton. Edward T. Austin, notary public for Galveston Co.

"Rec'd this package from the hands of Edward T. Austin, a notary public for Galveston County, the officer before whom the within deposition was taken, and mailed the same at Galveston, Texas, this 30 April, 1872.

"JA'S A. McKEE,
"By V. H. EDGAR,
"*Ass't P. M., Galveston.*

"Rec'd from P. O. at Austin & filed May 2nd, 1872. M. Hopkins, cl'k."

And the pl'ff on the same point had introduced the evidence of J. H. Williams, as follows:

369 *Interrogatories and answers of J. H. Williams.*

In U. S. circuit court at Austin, 1868.

HENRY H. WILLIAMS
vs.
JOHN D. NASH ET ALS. } No. 1054.

Interrogatories to J. H. Williams.

Int'g. 1st. What is your name, age, and occupation?

Ans. to 1st int'g. My name is John H. Williams. My age, 35 years. My occupation has been planting, saw-milling, and general business.

Int'g. 2nd. Where do you reside? If you say in Bastrop County, Texas, then state how long you have resided there.

Answer to int'g. 2nd. I reside in Bastrop County, Texas. I have resided there for about six years.

Int'g. 3. State whether or not you are acquainted with the defendants in this suit, John D. Nash, Oscar Nash, John Van Hagan, J. A. Hooper, and John Armstrong. If yea, state where they reside; and, if you know upon what league of land and in what county they live, and how long they have lived there, state.

Ans. to int'g. 3. I am acquainted with defendants to this suit.
370 They all reside in Bastrop County. Oscar Nash, John Van Hagen, & John Armstrong reside on league No. 4, in said county, granted to S. M. Williams. They have resided there some time; can not say exactly how long.

Int'g. 4. State whether or not you ever lived upon the same tract of land; and, if so, how long and when you were dispossessed, if dispossessed you were of the same. Give dates.

Ans. to int'g. 4. I lived on the said tract of land between five and six years, and was dispossessed of the same early in the month of December, 1867, about the 9th, as well as I remember.

Int'g. 5. State whether or not you, or yourself and others with you, ever set up any claim to this land. If so, who, together with yourself?

Answer to int'g. 5. William H. Williams claimed the said land, together with myself.

Int'g. 6. State whether or not you are acquainted with one Squire S. Cornett; and, if so, where does he live? How long have you known him? and state how you may know where said Cornett lives.

371 Ans. to int'g. 6. I am acquainted with Squire S. Cornett. He lives in Buchanan County, Missouri. I have known him for about five years. I know where he lives from his own statements, and also, because in a certain suit brought against me in the district court of the State of Texas, Bastrop County, he alleges that he does reside in the said county and State.

Int'g. 7. State whether or not you ever had any business transaction or transactions with said Cornett; and whether yourself and any other person with you ever had any business transactions with him. If yea, state fully the time of the transactions and what the transaction was.

Ans. to int'g. 7. I have had business transactions with the said Cornett, & W. H. Williams was concerned with me in the said transactions. The said transactions were had in September of 1863 and during the year 1864, and in the interval, as well as I remember. The transactions were for the purchase of some negroes, mules, & a wagon, & the business growing thereout.

trade the difficulty of placing at Mr. Cornett's attention was
was represented to the said Co in us, which, however, proved
lied upon our facilities afforde er also that Mr. Cornett ex-
to realize the amount in quest souri, & gave as a reason for
amount of money through the property there, & that he was
& the privilege of paying the use it to be confiscated.
Subsequently, & prior to th
tured & communication with n H. Williams.
made extra-hazardous. Whe
said Cornett of our inability to plaintiff? If yea, how old is
which negotiation was the gi ted for him and as his agent
swer to int'g. 8. In the inte me man that acted, as the
wagon was sold to us for $6 Williams, and as his agent in
for $9,000, as it now reads. h the machinery of the pro-
circumstance of our sa e sale of Sam. M. Williams'
376 government. The conte Colorado and Wilbarger's
1863, but the actual del name his children surviving
trade was not to take place u
ernment were impressing slav the pl'ff. He is somewhere
nett's ability to deliver the ne ives in the city of Baltimore,
liability to be impressed in th any agent in the State of
settlement of this difficulty it e his affairs, until, by power
order from the confederate au 865, the management of his
ployment from impressment. Up to the time of the war,
in case of impressment, inasm y from him; but its powers
they would thenceforth be per of visiting Texas regularly
contract. Lynn & Williams, of which

Int'g. 11. State, f you hav agents, collected his money,
wagons, teams, and other pro against the same; but were
its previous locality, and wh any portion of his affairs or
means of knowing. ar instructions from himself.

Ans. to int'g. 11. The negr the probate court records
at the same time. I ca or 1858, I forget which; I
377 nor when it arrived in so dead, and his surviving
property all came toge aroline Campbell, and Mary
Squire S. Cornett, and I hav
by him from Mis'ouri to this d league at the time of said
Cornett brought the propert ter of your house and the
his own statements. on the same tract? What

Int'g. 12. State any fact or l & improvements, and who
about, which may be materia u to W. H. Williams, and
you had been fully enquired illiams? Answer all these

Answer to int'g. 12. I ca were there on the land, &
granted to S. M. Williams, i Mrs. S. M. Williams die—
sion of the same, under a qu
S. M. Williams. Subsequen said land at the time of the
federate States gov't to er well as I now remember, W.
which we were joint and e residing in the same house.
erected & put in operation o not done so before, W. H.
interest equal throu is own. I cannot state the
378 Williams an undivide se in which I lived was on
received his quit-claim se to which W. H. Williams
the purchase of the negroes built expressly for his use
to enable us to carry out ou am first cousin to W. H.
government, I joined with and I am the nephew of S.
ing the whole tract as secu negro cabins. There were

as many as were necessary for the hands required on the place. There was about 400 acres of land actually in cultivation. Cannot state the date at which Mrs. S. M. Williams died.

Cross-int'g. 3. In what year did W. H. Williams first commence living on this league, & in what year did he first go there? Who had control of the league? Was it managed by P. C. Tucker, one of the administrators of Sam. M. Williams, or was the property (the league in suit) managed & under the control of the heirs? Did the heirs of Sam. M. Williams, or you, after you purchased from the heirs, account to the administrators of S. M. Williams for the rents, profits, use, & occupation of this league? If you did, state fully how you accounted, and were the accounts adjusted between you & W. H. Williams & P.
382 C. Tucker, adm'r, in the probate court? If they were not settled, why not? Did not the adm'rs, Tucker & W'm H. Williams, by an agreement of the heirs among themselves, turn over to the heirs the management of the estate of S. M. Williams? Answer fully & at great length. State whether the administrators or the heirs paid the debts of the estate of S. M. Williams; and if you say the administrators paid the debts, & not the heirs, name the debts the administrators paid. Did not, in truth, the heirs portion out among themselves the property of the estate of S. M. Williams verbally, and, in fact, assume to pay the debts; and have you not heard the administrators and the heirs speak of it, and do you not know what part each heir selected? Please state here the part that fell to each. Do not evade this by detailing the written partition in 1867; but tell us about the general verbal understanding & assent among the heirs as to which property each should have, & tell us to whom did this league fall. Answer all this fully or deny it, & read all these interrogatories over, and answer each; and also say who, before the war and during the war, had charge of your father's claim against S. M. Williams' estate.

383 Ans. to cross-int'g. 3. W. H. Williams first went to this league as its owner in 1861, and began living there in the same year. From the time he went there as its owner, he had entire control of its affairs until I purchased from him a half interest in it, when it was managed by ourselves jointly. We never accounted to anybody for the rents, profits, use, or occupation of the said league. We never offered so to account, & were never called upon to do so. We considered ourselves the bona-fide owners of the land, and therefore did not offer to account to any one. We knew the legal defect in our title, but considered the estate so wealthy that any idea of the land we had bought of the heirs being needful to pay a debt of the estate never occurred to us but as a possibility too remote to be worth consideration. I was not privy to any arrangement that may have existed among the heirs, and have no knowledge of their doings but by hearsay & through conversation with them. There was, however, some arrangement, the object of which was to save expenses, by which the heirs made sales of property & applied the proceeds to the payment of the debts of the estate, which were considerable. The arrangement was based upon the sup-
384 posed wealth of the estate, the assets of which, at anti-war valuations for land, of which it principally consisted, largely exceeded the indebtedness. By the arrangement referred to the heirs all joined in guaranteeing any title they might give a purchaser. The sale to W. H. Williams of the league in question, however, was an exception to this arrangement. This sale of the league of land was not made in accordance with the arrangement referred to. I cannot testify as to the details of the management of the estate of S. M. Williams; nor do I

know who paid the debts of the estate. My knowledge of the whole matter is very imperfect, and principally derived from W'm H. Williams. I know that whatever may have been done as to other portions of the property, this league was actually sold by the heirs, & without any guarantee whatever, to W. H. Williams, he giving to each of his co-heirs his promissory notes for the same, and receiving from each heir a quit-claim deed for his interest in the same. I have already stated, in answer to cross-interrogatory first, that up the period of the war my father visited Texas regularly & managed his own affairs, and I have no reason to believe the claim he held against the estate of S. M. Williams
385 formed any exception to this rule. In regard to the apportioning of property among the heirs, I know that arrangements were made for their support out of the assets of the estate, they being considered ample for this purpose and to pay all debts besides. I know they did not undertake to divide the whole estate. I do know of their having divided some of it. I do not know, however, the specific portions of the estate that were set apart to each heir. I know some of them, however. I know of a certain ten-acre lot situated in Galveston, of which each heir took a fourth; but afterwards I believe there was some change made in this arrangement. I cannot say what, however, or to what extent; and similar changes, I have reason to believe, were made with regard to other arrangements. In the settlement with the probate court I believe respect was had, as far as practicable, to the wishes of the heirs as expressed through the arrangements entered into among themselves.

Cross-int'g. 4. State how in the world did it happen that, as agent for your father, you managed to have your own homestead sold by order of the probate court of Galveston County? Could you not prevent it? Did you ever remonstrate with your father on the subject? In
386 short, explain why this particular league was sold, and particularly tells us why you would permit its sale, when you had solemnly warranted the title of it to S. Cornett, in writing, and knew that the sale would injure him. Please try, if you can, & explain why, of all the property of this estate, you pitched on this league of land. Explain the whole conspiracy to sacrifice Cornett—who hatched the brilliant idea, & who assisted you in carrying out this scheme.

Ans. to cross-int'g. 4. My father, for the first time, in 1865 constituted me an agent for the management of his affairs in Texas. I had the interests of my mother & brother to consider as well as my own. I was an enthu'astic believer in the confederacy and never expected to see its fall, and I entered into the transaction with Cornett in good faith at the time. The fall of the confederacy came, however, and with it the destruction of the value of the property I was to have held from Cornett, and a totally new set of laws, of which I had to take the evil, and felt it nothing more than right to extract from them, in return, whatever of good I could. I did not regard the trade as legally binding
387 upon me. I did not believe it could be enforced in the Federal court of law. As agent of my father, & responsible for the interest of my mother & brother in his assets, I came upon the claim against the estate of S. M. Williams, and offered, in settlement of the claim, to accept, in my father's behalf, a title to the league of land in question. My uncle's estate, as I understood, was nearly bankrupted by the results of the war, and this league of land was the only piece of property belonging to the estate, for the estate had never been divested of the title that would anywhere near settle my father's claim. The administrator seemed glad to avail himself of my offer & thus get rid of a

large claim, the settlement of which in any stricter way would have ruined all the parties concerned in the estate, and have seriously embarrassed the payment of other debts due by the estate. I knew that, in any event, my interest in the league of land was gone. I had not the means to pay the law-fees & other expenses necessary to sustain the view I entertained of Mr. Cornett's title, derived through me, & of the transaction by means of which he obtained the same. My
388 sympathies were of course with the rights of my father, mother, and my brother, and I believed the legal rights my father obtained by the arrangement I proposed to the administrator superior to any Cornett could present. I knew the judgment through which, or to satisfy which, my father's title to the league of land in question was obtained, was a judgment for a just and bona-fide debt, while I felt sure that Cornett's claim was illegal, & did not feel that he was morally entitled to anything more than a fair rate of hire for his negroes for the time we held them, which was offered him & refused.

Cross-int'g. 5. Who were the att'ys on each side in the suit between your father & S. M. Williams to revive some old judgment of your father's against S. M. Williams? Who paid the att'ys of your father? Were John B. & G. A. Jones connected as att'ys with this suit; and did not you and W. H. Williams settle the fee of John B. & G. A. Jones, att'ys at law, with Gus Jones? Think over the matter and get your assignee to show you your books, & state what fee was it you paid
389 to Gus Jones, & for what service and in what year, & on behalf of whom did you pay it, and for whom was J. B. & G. A. Jones att'ys in that suit? Who paid Mr. Ballinger's fee in the last suit, and who paid the fees in the first suit, of the att'ys? Think this matter over, and answer as fully as you can, giving the month and year of the payment of such fees, especially to Gus Jones.

Ans. to cross-int'g. 5. Ballinger & Jones, and not Jno. B. & G. A. Jones, were the att'ys in the suit of my father against S. M. Williams. They obtained the original judgment, and had it renewed. It never was suffered to expire. I paid the att'ys of my father as his agent and by his instructions. At the time I paid this fee I settled an old account of my father's of long standing with the firm of Ballinger & Jones, involving a number of items, for a considerable amount in the aggregate, & of which the fee in the above case constituted an item. I have already stated who were my father's att'ys in this case, & I do not know who were the att'ys of S. M. Williams. Myself & W. H. Williams did not settle the said fee with Gus A. Jones, but I, acting as my
390 father's agent, paid it, as above stated. The account with Ballinger & Jones above alluded to is duly receipted and on file among my father's papers in Galveston, Texas, or I would attach it hereto. The items referred to in the above account embraces the fee in both the suits against S. M. Williams.

Cross-int'g. 6. Did not you & W. H. Williams, under the purchase from the heirs, hold this league in your own right, & so represent it to Cornett? & did you not also represent it to one Puryear, and mortgage it to him? If so, how long did you hold it in your own right before you became tenants for H. H. Williams? And were you not, in conjunction with J. Wright Williams, holding the land in suit for H. H. Williams, and as his tenants, when you were sued in the sequestration suit by S. S. Cornett; and did you not, as agent for your father, retain att'ys to defend that suit? & did you not notify your father of Cornett's sequestration suit against you, and did not you, as his agent, consult with Mess's. Chandler & Turner as to the defence of that suit;

& was it not finally resolved to put in no defence? And have you
391 not, as agent for your father, employed counsel to defeat Cornett & to upset the title that you yourself conveyed to him? If you did not, then who did retain the att'ys for your father?

Ans. to cross-int'g. 6. We did so hold the league in controversy. We did represent ourselves as so holding it to the said Cornett. The said W. H. Williams, however, in my presence & that of Judge Paschal, represented to the said Cornett the condition of his father's estate and the nature of our title. Judge Paschal, however, stated that he knew the wealth of the estate, and that there was no danger to be apprehended on that score. But for the result of the war, and at property valuation prevailing up to the period of the war, the representations of the said Paschal to the said Cornett in regard to the wealth of the estate were fully justified by the facts. I was present at the said conversation, and have more than once discussed with the said W. H. Williams the effect of his said notice to the said Cornett upon the question likely to arise between ourselves and the said Cornett. I never participated in the mortgage to Puryear, and had no interest in the
392 place at the time it was made. We held it in our own right between three and four years. We were holding the land as tenants of Henry H. Williams when the said sequestration suit was commenced against us. As my father's agent, under the general powers entrusted to me in 1865, for the management of his affairs in this State already mentioned, I did employ counsel to defend his title to this league of land in such manner as they might deem best. I did advise my father that the said sequestration suit had been brought. I did have some conversation with Messrs. Chandler & Turner in regard to the sequestration suit, and understood from them that they did not propose to defend it for my father. I did, as agent of my father, employ counsel for the purpose of sustaining his title to the league of land in controversy.

Cross-int'g. 7. Was not your trade for the negroes with Cornett actually made in Austin in Sept., 1863, and were not the negroes actually delivered to you in Sept., 1863; and was not a written mem. of the contract, by both of you, left, in Sept., 1863, with Geo. W. Paschal;
393 and did you not afterwards exchange papers in accordance with this contract; and did you not have the use of the labor & hire and work of the negroes from Sept., 1863, to July or August, 1865; and did you not also have the mules & team purchased by you at the same time & in the same trade of Cornett, and at the time of the trade, in September, 1863? Did not you and W. H. Williams & Cornett—all three of you—talk of the effect of the war then waging on slave property in the presence of Judge G. W. Paschal; and did you not purchase, after considering all the contingencies and fully discussing among yourselves the questions of title, the chances of the bargain, emancipation, &c.? How long have you been agent for, and representative of, your father's interests in Texas? Who was his agent in Texas before and during the war?

Ans. to cross-int'g. 7. An agreement was made with Cornett in September, 1863, in the city of Austin, for the purchase of the negroes, a memorandum of which was left with Judge G. W. Paschal. The agreement did not, however, contemplate the delivery of the negroes,
394 or the final consummation of the trade, until the 1st January following, at which time the notes and deeds were to be executed, the negroes delivered, and a cash payment of $9,000.00 (coin) to be made to the said Cornett on account of the said trade. The principal part of

the negroes were delivered at or about the time appointed, the 1st Jan'y aforesaid, & the papers & notes were also executed & passed as contemplated. The negroes, as I have said, were not delivered in Sept., 1863, but the first of January following. Some of them, however, were delivered in September & shortly after, but the title to them did not become vested in us until the 1st January following. We never paid the said Cornett any wages for the labor of the said slaves for the time they spent with us prior to the 1st Jan'y aforesaid, though Cornett was drawing wages for such of them as were not so delivered; and the motive for fixing the 1st January as the period for the said delivery was partly that they might complete their engagement that had been made for their services during the current year. The negroes that were sent
395 to us in advance were not involved in engagements for any term of hire, & were sent to us in advance, & without our entering into any engagement to pay hire for the time. Their immunity while in our employment from all risk of impressment from the Confederate States government, in view of the engagement of the said Cornett to deliver them to us the 1st of January following, was considered a fair equivalent for their services. We had the use & services of the negroes from the date at which the title to them became vested in us until they were actually set free through the operations of Gen. Granger's order in 1865. The mules & wagon were delivered so soon as purchased; cannot state the time & circumstances of this last purchase, however, more particularly than I have already done in answer to direct interrogatory 10. We did talk of the effect of the war then waging upon slave property, but I do not think our remarks contemplated any risk other than that of capture through the invasion of the enemy. It is quite possible, however, our conversation may have involved all the contingencies named, but I cannot now state particularly. I have already answered, in cross-int'g. 1st, the last two questions of this interrogatory.

396 Cross-int'g. 8. Does T. A. Hooper live on, or reside on, or stay on the league in suit, and does not Armstrong stay on the land by the mutual consent of pl'ff & def't; and does he not hold equally for both, and is there not an understanding to that effect; and was not the suit brought under a misapprehension as to the character of his possession? What is the present age of your father, and the state of his health?

Ans. to cross-int'g. 8. J. A. Hooper does not reside on the league of land in suit. Armstrong was on the land as tenant of H. H. Williams, through J. Wright Williams. He was sued, as I heard, because he expressed an intention of denying his landlord. Subsequently I heard he had changed his mind about this; but that was after, as well as I am informed, the suit had been brought. I have answered as to my father's age in my answer to cross-int'g. 1. As to his health, I believe he is pretty well at this time.

Cross-int'g. 9. In answering 4th & 5th interrogatories, please give the day & year when W. H. Williams & the other heirs first took
397 possession of the league in suit. Were you not, in conjunction with the heirs, holding the land & living on it under your purchase from the heirs of S. M. Williams when you executed a deed of trust upon it to S. S. Cornett? Did you not afterwards cause this league to be sold by the probate court of Galveston, & did you not suggest to the court, & to the administrators, the sale of this league, and was it not sold with your consent; and if you had not consented, do you believe your father would have had it sold? Why did your father wait so long before attempting to enforce his debt? Have you not frequently

heard him say he would not press his brother's children about it, and did it not sleep in peace until you concluded to use it to sacrifice, as you supposed, Cornett's title to this league of land?

Ans. to cross-int'g 9. I cannot answer the points embraced in the first clause of this interrogatory more particularly than I have already done. I never held the place in conjunction with any one but W'm H. Williams. I believe my previous answers fully embrace the points in the third clause of this interrogatory. As to what my father
398 might or might not have done, with or without my consent, I cannot speak. As to why my father waited so long. I can only say the judgment was against his brother, whose estate, though large, consisted mainly of land, a forced sale of which would have been prejudicial to the interest of the same. My father was in no necessity for the money. His own estate was large, & ample for all his wants. There was every motive for leniency, & none for pressure. He was very particular, however, about his legal rights, and took all proper steps to preserve them. He was a heavy loser by the war. If Cornett held the land, it was lost to the estate of Sam'l M. Williams, and had paid none of his liabilities. As my father's agent, and with his approval, I felt that justice did not require that his property, the league of land in controversy, should be swept away by Cornett for a consideration that amounted to nothing in fact, & that I did not believe binding in law; and, believing that this league was liable to be sold to pay the just debts of Sam'l M. Williams, I proposed, as above stated, to the admin-
399 istrator to make it bring the amount of the debt due by the estate to my father, and hence the sale.

JNO. H. WILLIAMS.

Sworn to and subscribed before me this 20th day of June, 1868.

J. C. BUCHANAN,
Clk D. C., B. Co.

STATES OF TEXAS, *County of Bastrop:*

I, J. C. Buchanan, clerk of dist. court of Bastrop County, certify the foregoing answers of the witness Jno. H. Williams, in the cause pending in the U. S. circuit court at Austin, Texas, wherein Henry H. Williams is plaintiff, and John D. Nash et als. are defendants, were sworn to and subscribed before me the day and date first above written.

Given under my hand and the seal of said court, affixed at Bastrop, this 20th day of June, A. D. 1868.

[SEAL.]

J. C. BUCHANAN,
Clk D. C., B. Co.

And of M. F. Mott and W. P. Ballinger to be found in the second bill of exceptions, and referred to as part of this bill.

400 The defendants asked the court to charge the jury on the question of fraud as follows:

III.—*Instruction asked by defendants.*

The heirs of S. M. Williams took this legal title charged with the debts of the estate, and if you believe that the land in suit was sold fairly and in good faith to pay a bona-fide debt which had been allowed and approved against the estate of S. M. Williams, and that the order of sale was obtained without any fraud on the part of the pl'ff or of his agents, (for the acts of his agents, done by his consent or ratified by

him when done, are his acts,) then such sale passed the title to the plaintiff. But if you believe that the order of sale was obtained by a fraudulent collusion between the heirs of Williams, and J. H. Williams, agent for the pl'ff, and that the debt was never allowed or approved against the estate, then you will find for the defendants.

HANCOCK & WEST,
Att'ys for Def'ts.

REMARK OF THE COURT.—Modified according to the charge delivered.

And the court declining, as above, to give the instructions, proceeded on its motion to instruct the jury on the question of fraud, as follows:

401 "I therefore instruct the jury that the administrator's deed was good and valid to convey, and did convey, to the plaintiff, the title which S. M. Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff obtaining it.

"If the plaintiff obtained the deed for the purpose of defrauding the creditors of W. H. & J. H. Williams, and especially S. S. Connett, then the plaintiff cannot recover, and you will find a verdict for the defendants.

"This is the principal question for you to decide, viz, whether the order of sale, made by the probate court, was procured by the plaintiff in combination with W. H. and J. H. Williams, for the purpose of defrauding Connett out of his debt.

"In deciding this question you will assume that the judgement of the plaintiff against his brother, Samuel M. Williams, was a good and valid one. If they agreed to it, none but the creditors of S. M. Williams can question its validity. It cannot be assailed in this suit.

"You are also to assume that the judgement was duly pre-
402 sented to the administrators of S. M. Williams, and allowed by them, and approved by the proper judge of the probate court. These points must have been decided and are concluded by the action of the probate court, on the application for an order of sale.

"You are also to remember that the order of sale was made on the 30th January, 1866, whilst Connet' did not obtain his judgement against the Williams's, on the note, in this court, until the 9th of February, 1867, so that, when the order of sale was applied for and made, the only legal demand which Connett held against the property in question, if the sale of slaves was a void transaction, was the trust-deed given by W. H. Williams to J. R. Nichols to secure a note which was assigned to Connett, and when he obtained that, I do not remember if it was shown by the evidence.

"You are to remember, also, that the plaintiff having a valid and legal claim against the estate of S. M. Williams, had a right to
403 have any portion of the latter's estate applied to the payment of it, and whoever purchased any part thereof, purchased subject to that right.

"You are also to remember the rule of law, that fraud must be proved and cannot be presumed. If, however, it be proved to your satisfaction that either the plaintiff or his agent (for he is bound by the act of his agent) in collusion and combination with W. H. and J. H. Williams, or with the administrator, procured the order of sale to be made in order to defraud Connett, you will find for the defendant. If it be not so proved you will find for the plaintiff."

To the refusal of which said instructions, and to the charge given, as

above set forth, the defendants, at the time in open court, excepted as erroneous, and calculated to mislead the jury, and now here tender this their sixth and last bill of exceptions, and ask that the same may be signed and sealed and made a part of the record in this case, which is accordingly done.

JO'S P. BRADLEY, [SEAL.]
Asso. Justice Sup. Court U. S.

404 Application for writ of error endorsed in words, to wit: "H. H. Williams vs. J. D. Nash et als. No. 1054. Application for the writ of error. Filed June 11, 1872. M. Hopkins, cl'k." And is in words, to wit:

Application for the writ of error.

In United States circuit court for western district of Texas, at Austin

H. H. WILLIAMS, PL'FF, *vs.* J. D. NASH ET ALS., DEF'TS. } No. 1054. Def'ts' application for writ of error.

And now comes the def'ts John D. Nash, Oscar Nash, & John Van Hagan, and says that, at the June term, A. D. 1872, and on the 8th day of June, 1872, that a final judgment was rendered in the above styled cause in favor of the above-named plaintiff, and against the said def'ts J. D. Nash, Oscar Nash, and John Van Hagan; and that in the record, proceedings, and judgment, manifest error hath intervened to the damage of said defendants, all of which the def't is ready to verify, where the said def'ts pray that a writ of error issue returnable to the Supreme Court of the United States, at Washington City, at the next thereof, together with citation and supersedeas, as required by law, so that the errors in said record, proceedings, and judgment may be examined by the said Supreme Court, and the judgment
405 aforesaid reversed, and what is right be done in the premises, &c., &c., &c.

June 10, 1872.

HANCOCK & WEST,
Att'ys for Def'ts.

Also writ of error bond endorsed in words, to wit: "H. H. Williams, pl'ff, vs. J. D. Nash et als. No. 1054. Writ of error bond. Filed June 11, 1872. M. Hopkins, cl'k." And is in words, to wit:

Writ of error bond.

For the Supreme Court of the United States. In U. S. circuit court, western district of Texas, at Austin, June term, 1872, law side.

H. H. WILLIAMS, PL'FF, *vs.* J. D. NASH ET ALS., DEFT'S. } No. 1054.

Know all men by these presents that we, J. D. Nash, Oscar Nash, & John Van Hagan, as principals, and J. W. Brown, & John Hancock, & C. S. West, as sureties, are held and firmly bound unto the said H. H. Williams in the sum of ten thousand dollars to be paid to the said H.

H. Williams, his executors or administrators: To which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this the 10th day of June, A. D. 1872.

Whereas the above-named John D. Nash, John Van Hagan, &
406 Oscar Nash, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the joint judgment rendered in the above-entitled action by the said United States circuit court for the western district of Texas, (sitting at Austin,) which said judgment was rendered in said above-entitled cause in favor of said plaintiff, H. H. Williams, & against the said defendants, J. D. Nash, John Van Hagan, and Oscar Nash, on the 8th day of June, 1872, for the recovery of the land in pl'ff's petition described, being known as league No. 4, in Bastrop County, Texas, above the town of Bastrop, on the east bank of the Colorado River, & also for five thousand dollars damages and all the costs of suit, and ordering a writ of possession to issue in said cause against the said defendants above named, and also execution against them for the said damages & costs:

Now, therefore, the condition of this obligation is such, that if the above bonded J. D. Nash, Oscar Nash, & John Van Hagan shall prosecute their said writ of error to effect, and answer all costs & damages if they shall fail to make good their plea, then this obligation to be void; otherwise to remain in full force & virtue.

JNO. VAN HAGAN. [SEAL.]
JOHN D. NASH. [SEAL.]
O. F. NASH. [SEAL.]
C. S. WEST. [SEAL.]
JNO. W. BROWN. [SEAL.]
JNO. HANCOCK, [SEAL.]
By his att'y in fact, *by* C. S. WEST. [SEAL.]

Sealed & delivered in the presence of—
407 W. M. WALTON and W. P. BACON.

I hereby certify that I regard the above bond as good and sufficient in this case.
June 11, 1872.

M. HOPKINS, *Clk.*

The above bond is approved.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court U. S.

408 Also writ of error, endorsed in words, to wit: "H. H. Williams, pl'ff, vs. J. D. Nash et al. No. 1054."

Writ of error allowed.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

The clerk will notify pl'ff's counsel that a copy of this writ has this day been lodged for him.

HANCOCK & WEST,
Att'ys for Pl'ffs.

And is in words, to wit:

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Texas, at Austin, greeting:

Because, in the records and proceedings, and also in the rendition of the judgement your plea which is in said circuit court, before you, between H. H. Williams and John D. Nash, Oscar Nash, John Van Hagan, J. A. Hooper, and John Armstrong, (as to the last two of whom, however, the same was dismissed before trial,) a manifest error hath happened, to the great damage of the said J. D. Nash, John Van Hagan, and Oscar Nash, as by their complaint offers: We, being willing that the er'or, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-
409 mand you, if judgement be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in December next, 1872, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 4th day of December, A. D. 1871.

[L. S.] M. HOPKINS,
Clerk clerk *of the Circuit Court, Western District of Texas.*

410 And also copy of writ of error, endorsed in words, to wit:

"No. 1054. H. H. Williams, pl'ff, vs. J. D. Nash et al. Writ of error. H. H. Williams. Lodged for pl'ff, by def's, this 11th June, 1872.

"H. & WEST,
"*Att'ys for Nash et als.*

"We accept service of this copy of writ of error.
"June 12th, 1872.

"CHANDLER & CARLETON,
"*For Pl'ff H. H. Williams.*

"H. & WEST, *Def'ts, Att'ys.*

"Filed June 11th, 1872.

"M. HOPKINS, *Clerk.*"

And is in words, to wit:

Copy of the writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Texas, at Austin, greeting:

Because, in the record and proceedings, and also in the rendition of the judgement of a plea which is in said circuit court, before you, between H. H. Williams and John D. Nash, Oscar Nash, John Van Hagan, T. A.

Hooper, and John Armstrong, (as to the last two of whom, however, the same was dismissed before trial,) a manifest error hath happened, to the great damage of the said J. D. Nash, John Van Hagen, and Oscar Nash, as by their complaint appears: We, being willing that
411 the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in December next, 1872, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court *to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court* may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 4th day of December, A. D. 1871.

[L. S.] M. HOPKINS,
Clerk of the Circuit Court for the Western Dist. of Texas.

Allowed:

JOSEPH P. BRADLEY,
Ass't Just. of Sup. C't U. S.

Attest: M. HOPKINS, *Clerk.*

412 Also a citation in error, endorsed in words, to wit: "John D. Nash, Oscar Nash, John Van Hagan, pl'ffs in error, vs. Henry H. Williams, def't in error. No. 1054. U. S. circuit court west'r. distr. of Texas, at Austin sitting. Citation in error." And is in words, to wit:

Citation in error.

The United States of America to Henry H. Williams, or his att'ys of record, F. W. Chandler and F. Carleton & A. J. Hamilton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, 5th circuit, in and for the western district of Texas, sitting at Austin, in said district, wherein John D. Nash, Oscar Nash, John Van Hagan are plaintiffs in error, and you are def'ts in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the
413 Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and seventy-two.

[L. S.] JOSEPH P. BRADLEY,
Associate Justice of Supreme C't U. S.

Test with seal of the circuit court of the United States in and for the western district of Texas, at Austin, the day and year above written.

[L. S.] M. HOPKINS, *Clk.*

On this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-two, personally appeared C. S. West before me, the subscriber, M. Hopkins, clerk U. S. circuit court in and for the western district of Texas, at Austin, and makes oath that he delivered in person a true copy of the within citation to F. W. Chandler, one of the att'ys of record of the said def't in error H. H. Williams, on 13th June, 1872.

C. S. WEST.

Sworn to and subscribed the 13th day of June, A. D. 1872.

M. HOPKINS, *Clerk.*

414 I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing four hundred and thirteen written pages contain a full and true transcript of the record and all the proceedings had in case No. 1054 on the law docket of this court, entitled Henry H. Williams vs. John D. Nash et als., as they appear of file and record.

In testimony whereof I have hereunto set my hand and the impress of the seal of said court, at Austin, this 14th day of October, A. D. 1872.

[SEAL.] M. HOPKINS, *Clerk.*

415 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Texas, at Austin, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court before you, between H. H. Williams and John D. Nash, Oscar Nash, John Van Hagen, J. A. Hooper, & John Armstrong, (as to the last two of whom, however, the same was dismissed before trial,) a manifest error hath happened to the great damage of the said J. D. Nash, John Van Hagen, & Oscar Nash, as by their complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in December next, 1872, in
416 the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 4th day of December, A. D. 1871.

[SEAL.] M. HOPKINS,

Clerk of the Circuit Court for the Western District of Texas.

417 (Indorsed:) 1054. H. H. Williams, pl'ff, vs. J. D. Nash et als. Writ of error.

Allowed:

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

The cl'k will notify pl'ff's counsel that a copy of this writ has this day been lodged for him.

H. & WEST, *Att'ys for* .

418 The United States of America to Henry H. Williams, or his att'ys of record, F. W. Chandler & F. Carleton & A. J. Hamilton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, 5th circuit, in and for the western district of Texas, sitting at Austin, in said district, wherein John D. Nash, Oscar Nash, John Van Hagen, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 12th day of June, in the year of our Lord one thousand eight hundred and seventy-two.

JOSEPH P. BRADLEY,
Associate Justice of Sup. C't U. S.

Test with seal of the circuit court of the United States in and for the western dist. of Texas, at Austin, the day and year above written.
[SEAL.] M. HOPKINS, *Clerk.*

419 On this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-two, personally appeared C. S. West before me, the subscriber, M. Hopkins, clerk U. S. circuit court in and for the western district of Texas, at Austin, and makes oath that he delivered in person a true copy of the within citation to F. W. Chandler, one of the att'ys of record of the said d'f't in error H. H. Williams, on the 13th of June, 1872.

C. S. WEST.

Sworn to and subscribed the 13th day of June, A. D. 1872.
M. HOPKINS, *Clerk.*

(Indorsed:) No. 1054. U. S. circuit court west. dist. of Texas, at Austin sitting. John D. Nash, Oscar Nash, John Van Hagan, pl'ffs in error, vs. Henry H. Williams, def't in error. Citation in error.

(Indorsement on cover:) No. 447. John D. Nash, John Van Hagen, and Oscar Nash, plaintiffs in error, vs. H. H. Williams. W. Texas C. C. U. S. Filed 2nd November, 1872.

Supreme Court of the United States.

DECEMBER TERM, 1873.

J. D. NASH *et al.*, Plaintiffs in Error,
vs.
HENRY H. WILLIAMS, Defendant in Error.
No. 229.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR THE PLAINTIFF IN ERROR.

General Statement of the Case.

This was an action of trespass to try title, filed on the 29th of April, 1868, by the defendant in error, against the plaintiffs in error, J. D. Nash and others, for the recovery of a league of land near the town of Bastrop, on the Colorado river, known as League No. 4, and originally granted to S. M. Williams.

The plaintiffs in error filed a plea of not guilty, and the cause was tried on the 4th of June, 1872, resulting in a verdict and judgment for the defendant in error.

Title of the Defendant in Error.

The title relied on by the defendant in error was an administrator's deed, dated the 15th of April 1866, (Transcript, p. 24,) and also another administrator's deed dated the 2d of January, 1868, (Trans., p. 27,) and a release from the administrator to the defendant in error of a vendor's lien

on the land sued for, dated the 15th of April, 1866. (Trans., p. 25.)

These deeds were made, or claimed to be made, by virtue of an order of the probate court of Galveston county, entered in the due course of the administration of the succession of Samuel M. Williams, deceased, which order was entered at the January term of the probate court of Galveston county, in 1866. (Trans., p. 22.)

It purported to be based on a debt due by the estate of S. M. Williams to the defendant in error, and in support of which claim evidence was introduced showing that a judgment had been rendered in the United States District Court at Galveston on the 28th of June, 1850, in favor of the defendant in error, against the intestate, S. M. Williams, for the sum of $26,736, and that afterwards, in 1858, a suit had been instituted on that judgment, and another judgment obtained on the 12th of July, 1858, for $43,936 34. (Trans., p. 62.)

Evidence was also introduced as to the efforts made to establish the judgment debt as a claim against the estate of the intestate. Proof was also offered showing the loss and destruction by fire of the records of the two judgments. (Trans., pp. 63–66.)

This was substantially the basis of the right of recovery of the defendant in error.

In connection with his paper title, the defendant in error offered in evidence the two depositions of the defendant in error himself, taken *de bene esse* at different times. (Trans., pp. 67–69.)

Title of the Plaintiffs in Error.

The plaintiffs in error, being in possession, sought to defeat the recovery by showing—

1. That the alleged order and decrees of the probate court were void, for want of jurisdiction or authority in that court to make the order.

2. That if the order of sale was not void from want of authority in the court to make it, then that it was obtained

by fraud and collusion, and that no such debts had ever been established against the estate of the intestate as those for the payment of which the alleged sale was made.

3. The plaintiffs in error set up that one S. S. Connett had purchased the league of land in question from the heirs of the intestate, and held a better title to it than the defendant in error; and in support of this they offered in evidence a deed made to S. S. Connett on the 2d of June, 1868, by one R. A. Smith, assignee in bankruptcy of J. H. & W. H. Williams. (Trans., p. 83.) This deed was based on a settlement made by the said Smith, as assignee of the said J. H. & W. H. Williams, with the said Connett, of a certain claim, evidenced by a note and deed of trust executed by the said Wm. H. Williams to one Wesley Puryear, giving him a mortgage on the land in suit, (Trans., p. 84,) the two Williams's being shown to have in themselves the title to the league of the heirs of the said intestate.

4. The plaintiffs in error asserted title in S. S. Connett, by reason of a marshal's sale and deed to him of the land in question, based on a judgment rendered in the United States Circuit Court on the 9th of February, 1867, in favor of S. S. Connett, against J. H. & W. H. Williams, (Trans., p. 86,) which deed was dated on the 18th of May, 1867. (Trans., p. 88.)

5. The plaintiffs in error set up as a defense another deed to the land in suit, executed to S. S. Connett on the 18th of June, 1867, by N. S. Rector and Ed. Finnin, who acted as substituted trustees by virtue of a deed of trust on the land in suit, executed by J. H. & W. H. Williams to S. S. Connett on the 1st of January, 1864, to secure $27,510 represented by notes, which notes were given for certain negroes, mules, and a wagon, sold by S. S. Connett to W. H. & J. H. Williams on the 1st of January, 1864. (Trans., pp. 93, 95, 97, 115.)

There also was proof that the negroes were removed by S. S. Connett from Missouri to Texas in October, 1861,

(Trans., p. 111,) along with the Confederate forces, as they moved out of Missouri.

Evidence was also introduced showing that the other heirs of S. M. Williams, the intestate, had conveyed, by quit-claim deed, all their interest in the land in suit to their co-heir, Wm. H. Williams, in September and October, 1862, and that said Wm. H. Williams, on 28 November, 1862, conveyed an undivided half of the *locus in quo* to John H. Williams. (Trans., pp. 89–93.)

6. The plaintiffs in error, as a further defence, relied upon certain judicial proceedings, by which S. S. Connett had, on the 7th of December, 1867, filed a suit in the United States Circuit Court against J. H. and W. H. Williams for the land in suit, (Trans., p. 71;) and had on the same day sued out a writ of sequestration, (Trans., p. 75,) and on the 19th of February, 1868, replevied the land, (Trans., p. 77;) and had on the 9th of June, 1868, recovered judgment (no answer having been filed by the defendants, though duly served) for the land in suit against W. H. Williams and his wife Eddie, and John H. Williams and his wife Anna C. (Trans., p. 80.)

Proof in this connection was also introduced to show that J. H. Williams was at that time the general agent in Texas of the defendant in error, (Trans., pp. 131, 137,) and that when the sequestration suit was instituted on the 7th of December, 1867, the said J. H. and W. H. Williams were tenants of the said H. H. Williams, and that they notified him of the institution and pendency of that suit; and he, the defendant in error, consulted and paid counsel in regard to it, and announced in writing to the said S. S. Connett that he was the landlord, and would make defense, and waived his right of replevying the land, and took testimony in the cause. (Trans., p. 81.)

The particular sections of the act of 20 March, 1848, to regulate proceedings in the county court pertaining to estates of deceased persons, which entered into the charge of the court, and which the plaintiff in error insists were misconstrued, are the following articles of Paschal's Digest:

"ART. 1309. (1158) [49] No executor or administrator shall allow any claim for money against his testator or intestate, nor shall any chief justice approve of any such allowance, unless such claim is accompanied by an affidavit in writing that the claim is just, and that all legal offsets, payments, and credits known to the affiant have been allowed; which affidavit, if made in the county where the letters were granted, may be made before any officer of the county authorized to administer oaths: if made in any other county in this State, it shall be before some chief justice or notary public, and shall be attested by his official seal: if made out of this State, it shall be made before some judge of a court of record having a seal, and shall be attested by the seal of his court. If any such claim is allowed or approved without such affidavit, such allowance or approval shall be of no force or effect.

"ART. 1315. (1164) [55] When any executor or administrator shall neglect to apply for an order to sell sufficient property of the estate he represents to pay the expenses of administration and the claims against the estate that have been allowed and approved or established by suit, such executor or administrator shall be required by the chief justice, on the application in writing of any creditor of the estate, whose claim has been allowed and approved and established by suits, or any heir, devisee, or legatee of the deceased, to present to the court at some regular term thereof a statement in writing like that provided for in the preceding section; and upon proof to the court, by any such creditor, heir, devisee, or legatee, that a necessity exists for a sale to pay the expenses of administration and the debts of the estate, it shall be the duty of the chief justice to order such sale to be made: Provided, the executor or administrator shall have been first cited.

"ART. 1322. (1171) [62] Sales of personal property, other than slaves, for the payment of debts, may be ordered either for cash or on such credit as the chief justice may direct; and all sales of land or slaves for the payment of debts shall be made on a credit of twelve months, except when such sales are ordered to raise the amount of the allowance that may be made under the provisions of the forty-fourth and forty-fifth sections of this act, or for the satisfaction of a mortgage or other lien on said land and slaves; in which cases such sales shall be made on such terms as the chief justice may direct.

"ART. 1327. * * * After any such decree of con-

firmation shall have been made, upon the purchaser complying with the terms of sale, the executor or administrator shall execute and deliver to him a conveyance of the property so sold, if it were either land or slaves, reciting therein the decree confirming the sale and ordering the conveyance to be made, which conveyance of land or slaves so made shall vest the right that the testator or intestate had in the purchaser, and shall be *prima facie* evidence that all the requisites of the law have been complied with in making the sale; and such decree of confirmation of the sale of personal property, other than slaves, shall in like manner vest the right and title thereof in the purchaser, and shall be like evidence that all the requisites of the law have been complied with in making the sale of such personal property.

"ART. 1373. (1221) [112] When a person dies, leaving a lawful will, of all his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all the estate of such person not devised or bequeathed shall vest immediately in his heirs-at-law; but all of such estate, whether devised or bequeathed or not, except such as may be exempted by law from the payment of debts, shall still be liable and subject, in their hands, to the payment of the debts of such testator; and whenever a person dies intestate, all of his estate shall vest immediately in his heirs-at-law, but, with the exceptions aforesaid, shall still be liable and subject, in their hands, to the payment of the debts of the intestate. But upon the issuance of letters testamentary or of administration on any such estate, the executor or administrator shall have a right to the possession of the estate, as it existed at the death of the testator or intestate, with the exception aforesaid; and it shall be his duty to recover possession of and hold such estate in trust, to be disposed of under the provisions of this act."

Assignment of Errors.

1. The court erred in permitting the two depositions of the defendant in error, taken *de bene esse*, to be read to the jury.

2. The court erred in its charge to the jury as to the effect of the deed of the 17th of June, 1867, made by Finnin and Rector to S. S. Connett.

3. The court erred in its charge as to the effect of the sequestration suit.

4. The court erred in admitting the secondary evidence offered by the defendant in error, to show the existence and destruction of the two judgments alleged to have been rendered in his favor in the United States District Court at Galveston.

5. The court erred in permitting the deeds of the 15th of April, 1866, of the 2d of January, 1868, and the release of the 15th of April, 1866, to be read in evidence, as the record showed a want of power and authority in the court to order the deeds to be made; and the court erred in the charges given, and in refusing those asked by the plaintiffs in error concerning the legal effect of said deeds.

6. The court erred in its charge to the jury on the issue of fraud in obtaining the order of sale in the probate court of Galveston county.

Each of the above assignments of error will be briefly considered, and when so considered, such portions of the charge of the court, or of the evidence, as are complained of, will be fully set out under each head.

I.

Rulings of the court in permitting the two depositions of H. H. Williams to be read to the jury.

In June, 1868, the deposition of the defendant in error (who was the plaintiff below) was taken *de bene esse.* (Trans., p. 67.)

The facts sworn to in the first deposition are not set out in full, because they were, as appears from the 3d bill of exceptions, (Trans., p. 67,) identical with those stated in the second deposition, which was also taken *de bene esse* on the 4th of January, 1869, (Trans., p. 70,) with the exception that the last, in addition to a repetition of the former deposition, detailed a conversation which the defendant in error had with George W. Paschal.

These two depositions, when offered in evidence, were objected to, because—

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These two depositions, when offered in evidence, were objected to, because—

1. The plaintiff (defendant in error) had no right to give evidence in the cause by deposition.

2. The plaintiff (defendant in error) had no right to give a *de bene esse* deposition.

And to the second deposition, in addition, it was objected to—

3. Because no order of court had been obtained authorizing it to be taken. (Trans., p. 70.)

Prior to the act of July 2, 1864, (sec. 3, 13 Stats. at Large, 351; 2 Bright. Dig., 133,) a party to a suit could not testify at all, on the law side of the court, either by the laws of the United States or of Texas.

The act above referred to removed the disability to give evidence by reason of being a party to the suit. By its terms a party can testify orally, as any other witness could at common law; but he cannot testify by deposition, because that mode of taking evidence is in derogation of the common law, while the power of examining any witness by deposition is purely statutory. And the statutes, both of the United States and of the State of Texas, regulating the manner of taking evidence by deposition, were passed long before the disqualification of parties from testifying had been removed, and refer only to the manner in which the evidence of witnesses who are not parties shall be taken by deposition. But no provision has ever yet been made for taking the depositions of parties to suits in their own behalf, and hence there is no authority by law in any officer to take their evidence by deposition.

3 Blackstone's Comm., 383.

The additional objection to the second deposition is, that no order of court was obtained authorizing it to be taken.

The 30th section of the act of September 24, 1789, 1 Stat., 88, (Bright. Dig., 262,) authorizing the taking of depositions *de bene esse*, evidently intended, by its terms, that after the taking of the deposition, it should be returned into court, and remain sealed until published in open court. After that was done, and the deposition opened in

the manner required by law, no other deposition of the same witness could be taken, unless for good cause shown to the court.

If this was not so, not only might the costs and expenses of suits be greatly and indefinitely increased, but their trial delayed.

The most serious objection, however, to the practice adopted in the case at bar is, that it enables the party, after he has had time to weigh the effects of his evidence, to amend and supplement it by an additional oath. Such a course is not conducive to the ends of justice.

This statute, authorizing evidence to be taken *ex parte*, (now changed by the act of May 9, 1872,) has always been rigidly construed.

In *Walsh* v. *Rogers*, 13 Howard, 286, where the court say: "There is now seldom any necessity for having recourse to this mode of taking testimony. Besides, it is contrary to the course of common law, * * * and is liable to great abuse."

It is believed that there is and was no law, when these depositions were taken, authorizing parties to suits to give evidence by deposition. And if there is, when a deposition has once been taken *de bene esse*, the party cannot of his own motion take his own deposition without special authority from the court.

In *Garner* v. *Cutler*, 28 Tex. R., 182, it was held: "That the taking of testimony by deposition being a departure from the common-law rules of evidence, the statutory regulations on the subject must be *fully* if not strictly complied with."

II.

The second assignment of error relates to the construction given by the court (in its charge to the jury) to the deed for the land in suit, executed by Rector and Finnin, as substituted trustees to S. S. Connett, on the 18th of June, 1867. (Trans., pp. 93 to 97.)

The deed of trust, by virtue of which the deed in ques-

tion was executed, was dated 1st of January, 1864, (Trans., p. 93,) and was made to secure to S. S. Connett the payment of $27,510, evidenced by three notes of the same date, executed by J. H. and W. H. Williams, for certain negroes, mules, and a wagon, sold to them by S. S. Connett.

The evidence on this point showed (Trans., p. 103 *et seq.*) that in 1861 S. S. Connett left Missouri with these negroes, on the retreat south of the Confederate forces in 1861, and that they reached Red river in the fall of 1861. That he hired out the slaves in his possession in Texas from 1861 to 1864, in different places and to different persons, and continued to use them as his property, without any effort whatever to sell them, so far as the evidence discloses, from the time of their arrival in Texas until their sale to J. H. and W. H. Williams, on the first of January, 1864.

This is the substance of the proof on this point, and on these facts, and these alone, as disclosed by the record, the court charged the jury as follows:

"With regard to the trust deed under which the sale was made, I instruct you, gentlemen, that if you believe that Connett brought the slaves from Missouri in August or September, 1861, during the war, *for the purpose of disposing of the same*, being a citizen of Missouri, that it was an unlawful act on his part, contrary to his duty as a citizen of the United States and of Missouri, and his sale of the slaves here was a transaction void in law, and cannot be enforced in the courts, and if the consideration of the trust deed was illegal and void, the deed itself was void, and no title can be derived under it by Connett, for whose benefit it was executed." (Trans. p. 17.)

We submit that the charge of the court is fairly amenable to criticism, and was calculated to mislead the jury, in view of the facts proved.

There was no evidence whatever "that Connett brought the slaves from Missouri in August or September, 1861, during the war, *for the purpose of disposing of them.*"

The evidence shows that Connett's sympathies were with the confederates, or rebels as they are called, and that when their forces abandoned that portion of Missouri, and

his immediate home became the theatre of active war, he moved south along with the retreating Confederate forces, and came with his property to Texas, not to sell it or "dispose of it," but to keep and preserve it, and that he did keep possession of it for several years; and, so far as the evidence discloses, the idea of selling them to Williams, or any one else, may not have and probably did not occur to him until the contract of sale was made, in September, 1863. Certain it is that there is no evidence in the record that such was his purpose at the time he came to Texas.

The illegality of the trust deed, and consequent vice in the deed under which Connett held, is predicated by the court upon the *sole ground* that there was evidence from which the jury could infer that it was the intention of S. S. Connett, in 1861, when he left Missouri, to dispose of these negroes.

We insist that there was no evidence of any kind offered to prove such intention, or tending to prove it, and that the charge was for that reason inapplicable and erroneous.

In *Ward* v. *United States*, 14 Wallace, 28, and in *Michigan Bank* v. *Eldred*, 9 Wallace, 544, it is held to be error to charge upon a state of facts on which there was no evidence. It may also be added, that the evidence disclosed that the negroes were not the only consideration for the trust deed; besides them a certain wagon and some mules also constituted a part of the consideration of the notes, to secure which the deed of trust was executed.

But the principle of the instruction cannot be maintained. If it had reference to the non-intercourse act of 13th July, 1861, which was proclaimed 16th August, 1861, (12 U. S. Stat. at Large. p. 257, § 5,) then it is inconsistent with the well-considered opinion in *Corbett* v. *Nutt*, 10 Wall., 464, 465, 480, which held that, even had Connett been a citizen of Missouri, (which he was not, after his removal with his slaves in August, 1861,) only the United States could take advantage of the sale of the property, and that the buying and selling between people of the same community were not "sales, transfers, and convey-

"IN THE UNITED STATES CIRCUIT COURT AT AUSTIN.

"S. S. Connett
v.
"J. H. and W. H. Williams. } No. 1026.

"We, the undersigned, attorneys for Henry H. Williams, who will interplead as landlord in the above-stated cause, and claim the land in dispute in his own right, wlil not replevy the land in controversy.

"CHANDLER, TURNER & CARLETON,
"*Attorneys for H. H. Williams.*"

Under the sequestration act of Texas, above cited, the defendants in that suit had thirty days in which to replevy the land; and that being an action of trespass to try title, by the laws of Texas the landlord had a right to appear and make himself a defendant. There is no special form in which this is to be done, and he can be made a defendant by a written application, or, as held in *Caldwell* v. *Fraim*, 32 Tex., 325, by a mere oral motion.

As such defendant he had the right to replevy the property, and he appeared for the purpose of asserting and waiving his privilege as landlord.

The land was replevied on the 19th of February, 1868, by S. S. Connett, and he received possession of it under the writ of sequestration, and so continued to hold it. And while he was thus holding it, on the 29th of April, 1868, the present defendant in error instituted the present suit, based upon an alleged wrongful entry and trespass averred to have taken place on the 1st of January, 1868, at which time the marshal, and not S. S. Connett, had possession of the land. (Trans., p. 76–77.)

The plaintiffs in error only occupied the property as agents of S. S. Connett, who, as before stated, had come into its possession under the writ of sequestration, and by virtue of the replevy bond executed by him.

The condition of this bond was, "that the property shall be forthcoming to abide the decision of the suit." (Act of February 8, 1860; Paschal's Dig., art. 5101.)

In other words, when this suit was instituted, the land

in controversy was held by S. S. Connett, under the replevy bond, and subject to the orders of the court.

On the 19th of June, 1868, and while the present suit was still pending in the same court, the sequestration suit of S. S. Connett *v.* Wm. H. and J. H. Williams for the same land now sued for came on for trial. All the defendants, that is, J. H. Williams and his wife Anna C., and W. H. Williams and his wife Eddie, and the landlord, H. H. Williams, who had been notified of the pendency of that suit, and who had engaged attorneys and paid them to examine into the case, and who had also taken evidence in the cause, (Trans., pp. 78–79,) failed to answer, and made default, and a final judgment was rendered against them on the 19th of June, 1868, by which S. S. Connett recovered the land in suit. (Trans., p. 80.)

It was shown also that the defendant in error had actual notice of this suit, (Trans., p. 81,) and that when it was brought, W. H. Williams was his tenant, and J. H. Williams was not only his tenant, but was his son and general agent in Texas, and was, as such agent, in possession of the land in suit, in conjunction with W. H. Williams, who was his brother in law and first cousin. It was also shown that H. H. Williams appeared in that suit and notified the plaintiff in it, S. S. Connett, of his relation to the other defendants, and waived his statutory right of replevying, which he had as a defendant. It was also in evidence that he took the deposition of the witness Ballinger, by his attorney, F. W. Chandler, of the law firm of Chandler, Turner & Carleton, by whom he proved the same matters which he also afterwards proved by him in the present action. (Trans., p. 78–79.)

On these facts the plaintiffs in error asked the court to instruct the jury as follows: (Trans., p. 81.)

"If, however, the jury believe from the evidence that the plaintiff, (defendant in error,) H. H. Williams, had actual notice of the sequestration suit of Connett *v.* J. H. & W. H. Williams, and employed counsel, and had opportunities to appear and defend, and failed to do so, then the judgment

in that cause is as binding on him as if he had been a party to the record."

The court refused to give these instructions, in the following language:

"Disallowed and explained, as appears by the charge delivered."

The plaintiffs in error then asked the court to charge the jury as follows: (Trans., p. 82.)

"If the jury believe that, at the time the plaintiff alleges the trespass to have occurred, and at the time the suit was filed, the land was in the custody of the law, and that the defendants (plaintiffs in error) entered under the authority of the court, and were then holding subject to the judgment of the court when this suit was brought, then you will find for the defendants," (plaintiffs in error.)

Which the court refused in the following language: (Trans., p. 82.)

"Disallowed, because the facts do not authorize such a charge. Connett had replevied the land in February. This suit was not brought till the 29th of April, 1868."

The proceedings in the sequestration suit were introduced in evidence for two purposes: One, to show a former recovery, that was so binding and conclusive on the defendant in error as to prevent his obtaining a judgment in his favor in the present action. The other, to show that at the time this suit was brought the land in controversy was in the custody of the law, and that no action of trespass or for its recovery could be brought until it ceased to be in the custody of the law.

We will briefly consider—

1. The effect of the action of trespass to try title and sequestration on the title of the defendant in error.

2. The effect of the sequestration suit on the right of the defendant in error to maintain this present suit, the present action having been brought on the 29th of April, 1868, while the sequestration suit was still pending, and the prop-

erty held by the plaintiffs in error, by permission of the court, under the replevy bond of S. S. Connett.

1. As to the first proposition, while it is true, as a general rule, that no one can be made a party to a judicial proceeding without a voluntary appearance of record, or a formal and legal summons to appear, (Martin *v.* Gerhardt, 7 Harris, 124,) yet the strictness of this rule has been many times departed from,.and it is now an exception, as well settled as the general rule itself, that the voluntary intervention of a party, in the prosecution or defense of a cause in which he has intervened, will compel him to abide the result, even though he may nowhere appear as a formal party to the record.

Peterson v. *Lathrop*, 10 Casey, 223.
Chambers v. *Lapsley*, 7 Barr, 24.
Doe v. *Challis*, 17 Ad. & Ellis, (N. S. Q. B.,) 166; 79 Eng. C. L., 165–167.
Miles v. *Caldwell*, 2 Wall., 35.

In *Doe* v. *Challis* and *Chambers* v. *Lapsley*, above cited, it is held that a judgment against a tenant in ejectment is evidence as proof of title against the landlord, when he has notice, and when the defense is conducted by him in the name of the tenant, though he be not a party to the record.

Richards v. *Watson*, 23 Mo., 34.
Tarleton v. *Johnson*, 25 Ala., 300.
Chirac v. *Reineker*, 2 Pet., 617.
Marshall v. *Dupuy*, 4 J. J. Marsh., 388.
Bone v. *Walters*, 14 Tex., 564.
Coats v. *Roberts*, 4 Rawle, 104.
Valentine v. *Mahoney*, 37 Cal., 396.
Dutton v. *Warschauer*, 21 Cal., 619.
Calhoun v. *Dunning*, 4 Dallas, 120.
Hunson v. *Armstrong*, 22 Ill., 443.
Castle v. *Noyes*, 4 Kernan, 329.
Hunter v. *Britts*, 3 Campbell, 455.
Illies v. *Fitzgerald*, 11 Tex., 417.
Wheelock v. *Warschauer*, 34 Cal., 265.

The attention of the court is also called to the cases of

Barney v. *Dewey*, 13 Johns., 224, 225.

Blasdale v. *Babcock*, 1 Johns., 517.

Duchess of Kingston's Case, 2 Smith's Lead. Cases, 6 Am. ed., top p. 821; marg. pp. 683, 684.

It is a perfectly well-settled rule that a defendant may call upon any one whose liability for the cause of action is primary, or whose duty to defend it is higher than his, to assume the burden of the defense in the first instance. And the notice so given will bind the party as fully and effectually as if served with process.

Littleton v. *Richards*, 34 N. H., 179–187.

Jacks v. *Marsh*, 5 Wend., 44.

Beers v. *Pinney*, 12 Wend., 309.

Rawle on Cov. of Title, 3d ed., 226.

Paul v. *Whitman*, 3 Watts & Serg., 410.

Morrison v. *Miller*, 10 Casey, 12.

In *Duffield* v. *Scott*, 3 Term R., Mr. Justice Buller says:

"If a demand be made which the party indemnifying is bound to pay, and *notice* be given to him, and he *refused* to defend the action, in consequence of which the person indemnified is obliged to pay, that is equivalent to a judgment, and estops the defendant from saying he was not bound to pay."

In the case at bar, the defendants, J. H. and W. H. Williams, notified their landlord, the defendant in error, whose duty it was to defend them, that they were sued; and not only sued for the possession, but also that the right to the property was being adjudicated. According to the preceding authorities, he was as fully informed of the suit as if a legal summons had issued and been served on him.

The court, in its charge, says:

"It is claimed by the defendants (plaintiffs in error) that the plaintiff, (defendant in error,) Henry H. Williams, is concluded by this sequestration suit, because the defendants were tenants under him, and one of them was his general agent in Texas." (Trans., p. 82.)

By a reference to the instructions asked by the plaintiffs in error, (Trans., p. 81,) it will be perceived that the court was mistaken in supposing that the plaintiffs in error assumed that the judgment in the sequestration suit was binding on the defendant in error because his tenants and general agent had been sued.

No such position was assumed by the plaintiffs in error, for it is certain that the mere fact that the landlord's tenants were sued, and judgment obtained against them, would not be conclusive on him; for (amongst other reasons which might be given) they might be acting in collusion with the plaintiffs, or, by accident or design, the landlord might have no notice of the suit.

But the proposition of law presented by the plaintiffs in error was not that the mere fact that a judgment was obtained against the tenants estopped the landlord, but that, if the jury believed that the landlord, H. H. Williams, the defendant in error, had *actual notice* of the action of trespass to try title and sequestration, and employed counsel, and had the opportunity to appear and defend the suit, and failed to do so, then that judgment was binding on him.

If he had appeared and defended, the authorities above cited show that that judgment would have been binding on him.

That he had notice of the suit, that he employed and paid counsel, that he took evidence, that he appeared in his capacity of landlord and announced his purpose of record to defend, and asserted his right to defend, filed his written waiver of his right as defendant and landlord to replevy, is certain.

These acts we believe conclusive of his right.

The reason why such a third party as the defendant in error is bound by these judicial proceedings, is not because he *did* actually contest the matter in court, but because his relation to and privity with the parties made it his duty to defend the case, and that *due notice* was given to him.

The judgment binds him, not because he did appear and

defend, but because he legally appeared and could have defended, and failed to do so.

By the laws of Texas the statutory action of trespass to try title takes the place of the common-law action of ejectment. It is not a mere possessory action, but by a proper indorsement on the petition, to the effect that "the action is brought as well to try title as for damages," it becomes a suit in which the very right and title of the parties is put in issue. All fictitious proceedings are abolished, and not only is the title tried, but the question of mesne profits is also determined in the same suit. (Paschal's Dig., arts. 5292, *et seq.*)

On general principles, it is the duty of the tenant to notify the landlord, and when he is so notified, he has the right to make himself a party. As to how or in what manner this shall be done, is not prescribed by the law.

In *Caldwell* v. *Fraim*, (32 Texas, 325,) in construing the section of the trespass to try title act, which gives the landlord this right, the Supreme Court of that State say:

"No particular rule is prescribed by the statute by which they (landlords) may become parties; and without such positive rule * * * it would be more regular, by oral motion, to ask leave of the court to be made a party."

We submit that the solemn agreement filed in this case, in which the defendant in error says that "*he will interplead as landlord, and claim the land in his own right*," is emphatically an appearance in the cause, and as complete a one as if he had been served with process.

As we have shown from the case of *Caldwell* v. *Fraim*, (32 Texas, 325,) above cited, no particular form of entering an appearance is prescribed in the statute under consideration; it can be oral or in writing.

In *Crosby* v. *Houston*, (1 Texas, 223,) where the defendant had signed *certain agreements*, but filed no *general answer*, the defendant was deemed to be in court, and the judgment was held to be binding on him, though he was neither served, and though he did not plead to the merits.

In *Hutchinson* v. *Owen*, (20 Texas, 288,) where there was

a judgment by default, and in it a recital of an agreement of the parties for a stay of execution, this was construed by the court to be equivalent to an appearance as to a material amendment which had never been served on the defendant.

In *Wescott* v. *Menard*, (Dallam, 504,) the Supreme Court of the Republic of Texas held that a voluntary appearance supercedes the necessity of service of process, which is intended to procure an appearance.

We submit that the agreement of the defendant in error above referred to, connected with the fact that he took the evidence of Ballinger in that case, is a valid appearance, under the authorities above cited. And having appeared and submitted to the jurisdiction of the court, he must abide the legal consequences of his own act. He cannot appear, employ and pay counsel, assert and then waive his right to replevy, take evidence in the cause, speculate upon the chances of success, and then proceed or withdraw at his pleasure—he cannot thus play "fast" and "loose" in the case.

It may not be improper to make one further observation on the action of trespass to try title, as defined by the laws of Texas, suggested by a remark in the charge of the court, to the effect "that the tenant may be under such complications that the landlord's defense would be prejudiced thereby."

This remark may be and probably is applicable sometimes to the action of ejectment, both at common law and as regulated by statutes in some States.

It is sometimes applicable in Texas to mere possessory actions, and perhaps other suits not involving the merits of the title. But it will be perceived that, by the laws of Texas, where the statutory notice is indorsed (Paschal's Dig., art. 5293) on the petition, the suit is not a mere struggle for the temporary possession of the freehold, but it is in the nature of a writ of right, and becomes a question of title, and not merely of possession.

Then, where the landlord appears, he is, in the language

of the statute, "entitled to make such *defense* as if he had been the *original* defendant in the action."

He has a right to defend the action independently of his tenants, and no trickery or double dealing, or false admission, or attorning to the plaintiff on their part, can in the least prejudice the landlord's rights in Texas; because, while it is true that the result of the suit will incidentally determine the possession, that possession is a secondary consideration, arising after the question of title, a mere consequence of the main and real issue of title; and this issue is determined between the plaintiff and the landlord, wholly irrespective of any complications with which the tenants may have embarrassed the case or sought to prejudice the landlord's right.

We believe that a careful consideration of the act of February 5, 1840, known as the trespass to try title act, (Paschal's Dig., arts. 5292 to 5308,) will show that it was intended to provide a short and simple mode of trying title to land.

All the fictions of the old action of ejectment are abolished; no actual trespass need be proved; the question of title can be determined without either party having actual possession of the premises in dispute.

By its terms, it is provided that no act of the tenant shall cut off the real owner or landlord from making any defense he may see fit to make.

We believe that, whatever may be the rule elsewhere, in Texas every action of trespass to try title in which tenants are sued, is binding on the landlord, where the tenant acts fairly (as in this case) and gives the landlord timely notice, even where he fails to appear. But surely such judgment must be binding on him when he, in fact, does appear, employs counsel, and takes evidence.

If this construction of the act is erroneons, then, in many cases, no final result can ever be obtained by suits against tenants.

Take this case for instance: S. S. Connett lives in Missouri; the land is in Texas; H. H. Williams lives in Mary-

land; possession is taken by H. H. Williams in 1867, by tenants; S. S. Connett brings an action of trespass to try title against tenants in 1867; they notify H. H. Williams; he declines to defend; judgment goes in favor of S. S. Connett in 1868; he puts tenants in possession—say the plaintiffs in error. In January, 1869, H. H. Williams sues such tenants; S. S. Connett declines to defend or has no notice; but the tenants, finding the possession itself valuable, concluded to defend the action on their own account in the Circuit and Supreme Courts of the United States, and when it is decided adversely to them, and H. H. Williams has ejected them under his writ of possession, and placed new tenants on the land, S. S. Connett again comes forward and asserts that he had or had not notice of the former suit, but that owing to complications in which the tenants had become involved, he believed his rights would be prejudiced, and he concludes now to bring a new suit against the new tenants of H. H. Williams; and H. H. Williams, taking his cue from S. S. Connett, also allows his tenants either to fight the battle alone or suffer default, &c., &c., and thus the litigation is carried on *ad infinitum*, and the ear of the court constantly vexed with this interminable wrangle, in which it seems that nothing is ever decided that is binding on any one.

We do not believe this a proper construction of the statute, but, on the contrary, that the law in Texas is, that where the tenant is sued in trespass to try title in accordance with the statutory acquirements, and the landlord has actual, timely notice, and fails to defend, such a judgment is binding on him.

If this be not so, then the ancient action of ejectment still exists in Texas; and where the real owners are non-residents, they can, through the machinery of the courts of the United States, bring as many actions of ejectment as they please, provided they always let judgments go by default.

There is another aspect of the case which, we think, jus-

of the statute, "entitled to make such *defense* as if he had been the *original* defendant in the action."

He has a right to defend the action independently of his tenants, and no trickery or double dealing, or false admission, or attorning to the plaintiff on their part, can in the least prejudice the landlord's rights in Texas; because, while it is true that the result of the suit will incidentally determine the possession, that possession is a secondary consideration, arising after the question of title, a mere consequence of the main and real issue of title; and this issue is determined between the plaintiff and the landlord, wholly irrespective of any complications with which the tenants may have embarrassed the case or sought to prejudice the landlord's right.

We believe that a careful consideration of the act of February 5, 1840, known as the trespass to try title act, (Paschal's Dig., arts. 5292 to 5308,) will show that it was intended to provide a short and simple mode of trying title to land.

All the fictions of the old action of ejectment are abolished; no actual trespass need be proved; the question of title can be determined without either party having actual possession of the premises in dispute.

By its terms, it is provided that no act of the tenant shall cut off the real owner or landlord from making any defense he may see fit to make.

We believe that, whatever may be the rule elsewhere, in Texas every action of trespass to try title in which tenants are sued, is binding on the landlord, where the tenant acts fairly (as in this case) and gives the landlord timely notice, even where he fails to appear. But surely such judgment must be binding on him when he, in fact, does appear, employs counsel, and takes evidence.

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There is another aspect of the case which, we think, jus-

tified the instructions asked below, as to the binding force of the former judgment.

The evidence disclosed that in 1865 the defendant in error, by a power of attorney, intrusted his son, J. H. Williams, who was one of the defendants in the sequestration suit, with the management of his business in the State of Texas, (Trans., p. 137,) where J. H. Williams testifies, "that he was the general agent, in Texas, under a power of attorney from his father, H. H. Williams, and that when the suit was brought, he (J. H. Williams) held the land under him, and as agent for his father consulted Messrs. Chandler and Turner as to the defense of the suit."

By the fifth section of our trespass to try title act (Paschal's Dig., art. 5296) it is provided, that

"When a tenant is sued for lands of which he is in possession, the real owner, or *his agent or attorney*, may enter himself on the proceedings, as the defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action."

It will thus be seen, that in order, under the statute of Texas, to make the judgment binding on the real owner or landlord, it is not necessary that he should be a party to the suit at all, but his *agent*, or even his *attorney*, may bind him by becoming a party to the proceedings.

In this case, the tenant, W. H. Williams, and the *general agent*, *J. H. Williams*, were made parties to the suit. The defendant in error was a non-resident. He was represented in Texas by his son, as his general agent there, having charge of his general interests in Texas, and who had corporeal possession of the land in suit.

We think it does not matter in law whether the *general agent* voluntarily makes himself a party, or is solemnly cited to defend; in either case, the title of his principal is brought in issue under our statute, and the judgment is binding on him. And it is made so under the law of Texas, not by reason of the manner in which he becomes a party, but by reason of the fact that he, as *agent* or attorney in fact, represents his principal, and that notice to the

agent is notice to the principal. And the effect of the suit on the right of the principal is the same, whether the agent voluntarily became a party, or whether he be made such by process. In such case, the reason of the law is that *notice, actual notice*, is given to the principal. And in order that there may at some time be an end to litigation, public policy holds judgments rendered under such circumstances, with full notice and ample opportunity to defend, as binding on the party as if he had been sued in the first instance.

Coffee v. *Silvan*, 15 Texas, 354.

2. The second object for which these judicial proceedings were introduced, was to show, that at the date of the filing of the present suit, April 29, 1868, the property was in the custody of the law, and that, therefore, the defendant in error had no right to maintain the action.

The instruction asked on this point was as follows:

"If the jury believe that at the time the plaintiff (defendant in error) alleges the trespass to have occurred, and at the time the suit was filed, the land was in the custody of the law, and that the defendants (plaintiffs in error) entered under the authority of the court, and were then holding subject to the judgment of the court when this suit was brought, then you will find for the defendants" (plaintiffs in error.) (Trans., p. 82.)

And the court refused them:

"Disallowed, because the facts do not authorize such a charge. Connet had replevied the land in February. This suit was not brought till 29th of April, 1868." (Trans., p. 82.)

In refusing this instruction, the court virtually admitted the legal proposition contained in the charge to be correct, but denied that sequestered property, when replevied, was still in the custody of the law.

It is an elementary rule in all actions in the nature of ejectments, that the plaintiff must have the right to the possession, as well as the right to the property, at the time that the service is laid and the suit brought.

In *Cincinnati* v. *White*, (6 Peters, 441,) it is said, that "this is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession, and whatever takes away this right of possession, will deprive him of the remedy by ejectment."

On the same subject, Tyler, in his work on ejectment and adverse enjoyment, page 78, sums up the law very fairly, thus:

"In a word, the claimant in an action of ejectment must not only have a legal title to the lands in dispute, but he must have the right to the possession of the premises at the time of the commencement of the action; *and a clear title in the plaintiff, without a right of entry or a right by possession, will not answer the purpose.*"

With regard to the condition of the land when the trespass is alleged to have been committed, the court was mistaken in supposing that Connett had at that date replevied it. The trespass is alleged to have occurred on the 1st of January, 1868. (Trans., p. 1.) It is shown by the record, that from the 16th of December, 1867, until the 19th of February, 1868, the land was in the custody of the marshal, and that Connett never entered into possession under his replevy bond until the 19th of February, 1868. (Trans., pp. 76, 77.)

It is plain, therefore, that not only Connett was not a trespasser, or in possession at the date of the alleged trespass, but that at that time it was the marshal who was in possession of it.

The charge of the court was practically to the effect that, whether he was a trespasser at that date or not, he was legally liable.

This mistake in the charge of the court evidently grew out of a misapprehension of the evidence; the court overlooking the fact that it had been proved that Connett did not have possession of the land on January 1, 1868, but that at that date it was held by the marshal under the order of the court.

The court evidently intended, by the terms in which the

instruction asked was refused, to assert that the land, being at the time of the filing of the suit (April 29, 1868) in the possession of S. S. Connett, under his replevy bond, was no longer in the custody of the court. (Trans., p. 82.)

We submit that it was error to charge the jury that, because the plaintiff, S. S. Connett, had executed a replevy bond, and held the land under it, it was any less in the custody of the law than when in the actual possession of the marshal.

The fact is, that property attached or sequestered is in the custody of the law from the time that the levy is made until the final decision of the cause, unless the writ is before then quashed for some cause.

The agency by which it is held only is changed, but it still is firmly as ever held in the grasp of the law, to be forthcoming at and abide the result of the suit. No one would ever dare to replevy property, and execute a bond to have it forthcoming, as in this case, if, pending that litigation, a stranger could bring an action for the same property, and recover it from the person thus holding it.

In the 2d edition of Drake on Attachments, sections 290, 350, 453, and in *State* v. *Davis*, 1 Black, 106, the correct rule will be found laid down.

In *Fowler* v. *Stonum*, 6 Texas, 72, where the property was replevied, as in this case, and held under a replevy bond, the Supreme Court of Texas say:

"The defendant had invoked the aid of legal process to recover of the now plaintiffs this property, and *they had exercised their legal right* of replevying the property.

"A sequestration is a judicial deposit; so it is held that property levied on remains, *during the pendency of the levy*, in the custody of the law."

Whether the property be replevied or not during the time of the levy of the sequestration, the property is in the custody of the law.

In *Hagan* v. *Lucas*, 10 Peters, 404, this court say, in a case where a party had executed a replevy bond:

"On the giving of the bond, the property is placed in the

17 Black. 106
16 Mallan 218

possession of the claimant. His custody is substituted for the custody of the sheriff. *The property is not withdrawn from the custody of the law.* In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes as it would have been in the hands of the sheriff."

We submit that the court erred as to the effect of the replevy bond. After its execution the property still remained in *grœmio legis* as fully as before.

In fact, the present action, brought by the defendant in error while the other suit was then pending in the same court, and in which he had appeared and announced his purpose to interplead as landlord, and while the land was not in the possession of the plaintiffs in error, but in the custody and possession of the law, amounted to a contempt of the process of the court.

The attention of the court was called to the matter at an early stage, as will be seen from its action on the motion to withdraw the plea of general issue and plead in abatement, (Trans., p. 7;) but the court held that the proper mode was to show, under the plea of not guilty, that the plaintiffs in error were not trespassers, unlawfully in possession of the land, but that their possession was lawful.

This they showed beyond a doubt; and the court erred in not charging the jury that, the land being the custody of the law, both when the trespass is alleged to have taken place and when the suit was brought, the defendant in error could not recover.

That the defendant in error in this action must have not only the title, but also the right of possession, when he lays his trespass and brings his suit, is clear from the following authorities:

Hylton v. *Brown*, 1 Wash. C. C., 204.
Batterton v. *Jokum*, 17 Ill., 288.
Owen v. *Fowler*, 24 Cal., 192.

The defendant in error, if the proceedings in the sequestration suit did not bind him, certainly could not assert his

right, so long as the land was held by the authority of the court under its writ of sequestration. And from the time of the levy of that writ until quashed, whether the land was replevied by the defendant or by the plaintiff, or remained unreplevied by either party in the hands of the marshal, it was equally in the custody and possession of the law. And possession, so held, does not constitute such a trespass or ouster as would authorize a claimant to bring an action either of trespass or to try title.

IV.

The fourth assignment of errors relates to the ruling of the court in permitting the existence, destruction, and contents of the two judgments alleged to have been rendered in favor of the defendant in error against Samuel M. Williams, the one on the 28th of June, 1850, for $26,736, and the other on the 12th of July, 1858, for $43,936 34, both rendered in the United States district court, at Galveston, (Trans., pp. 56 to 66,) to be established by the parol testimony of James Love, W. P. Ballinger, M. F. Mott, and J. B. Jones, and a purported copy of a copy of the judgment purporting to have been made by James Love, on the 5th of April, 1858. (Trans., p. 62.)

The plaintiffs in error objected to the introduction of the secondary evidence offered—

1. Because the evidence adduced disclosed on its face that superior and better evidence of the fact sought to be proven than that adduced existed.

2. Because the alleged copy of the certified copy of the judgment contradicted itself and proved nothing.

3. Because the parties had not complied with the laws of Texas, regulating the proof of lost records, and because the whole proof offered was incomplete and insufficient.

4. Because the defendant in error failed to produce the certified copy, if there was one, of the judgment which was duly sworn to and presented to the administrator, and the existence of which his own evidence disclosed.

5. Because the defendant in error failed to show, as an

that art. 1311 of Paschal's Digest, which requires all claims and debts to be sworn to, presented, allowed, and approved before they become debts against the estate, applies to judgments of the State courts, and *a fortiori* would apply to judgments of a foreign jurisdiction, such as the United States courts. And so it was also ruled in *Hall* v. *McCormick*, 7 Tex. 275.

In *Borland* v. *Jones*, MS. opinion, December Term, 1872, the Supreme Court of Texas holds that this rule applies alike to foreign and domestic judgments.

We can, then, safely conclude that, in order to have this judgment ranked as a debt against the estate of S. M. Williams, the defendant in error complied with the law and took the steps enjoined upon him by the statute; and we are strengthened in this conclusion by the fact that, in 1858 or 1860, we find him consulting his attorney, Mr. Ballinger, who had obtained this judgment for him, and who advised him to obtain a certified copy of it and make the necessary affidavit; and also from the further fact that in 1866, according to the evidence of Mr. Mott, he presented himself as a creditor, having the right to invoke the action of the court in his behalf, a position that he could not legally occupy until his debt was duly sworn to, presented, allowed, and approved.

We conclude that his own evidence disclosed the fact that a duly-certified copy of the judgment was in existence; and before other evidence as to the contents of said judgment could be introduced, he should have shown that such certified copy was lost or destroyed, or beyond his reach. This he failed to do, and he did not even attempt it.

The statute of the United States, passed on the 3d of January, 1871, 41 Cong., 3d session, ch. CXI, Stats. at Large, p. 474, being an act relating to lost records, in its first section authorizes the loss, when proved, to be supplied by a duly-certified copy, when the same can be obtained.

The act of the State of Texas, which provides for the mode and manner of proving lost records, was passed on

the 11th of February, 1850, and is almost identical in its requirements with the act of Congress above cited. In its first section it provides that when "records are lost or destroyed the same may be supplied by copies duly certified." (Paschal's Dig., art. 4969.)

The evidence having disclosed that a duly-certified copy of the judgment was within the control of the defendant in error, it is respectfully submitted that the court below violated the rule of evidence laid down for its government in such cases, both by the act of Congress and that of the State of Texas, above cited, in permitting secondary evidence of the judgment to go to the jury without requiring the defendant in error to explain satisfactorily to the court why he did not produce the certified copy, the existence of which had been shown by the evidence of his witnesses, Ballinger and Mott. The latter witness, in answer to the second cross-interrogatory propounded to him as to where the claim was? (the claim consisting of the certified copy of the judgment duly sworn to and proved up,) replied, that the claim was, he supposed, among the papers of the estate, (Trans., p. 65,) that being the place from which the defendant in error could undoubtedly procure it, if it ever in fact existed as a claim against the estate.

2. The second objection relates to the action of the court, in allowing to be read in evidence the alleged copy of a certain certified copy of the judgment supposed to have been lost in Cummins' creek.

The evidence of the witness Chandler (Trans., p. 66) was to the effect that he once had in his possession a certified copy of the judgment, which had been lost in the mail in Cummins' creek, and that while that certified copy was in his possession, J. H. Williams made four or five copies of this certified copy, and that he believed the copy exhibited and made by J. H. Williams was a correct copy of that certified copy; but he could not swear that the copy of the certified copy attached to the witness Ballinger's deposition was one of the copies made by Williams from the certified copy; nor could he swear that it was a

correct copy of either that certified copy or of the original itself, though he believed it was.

If we assume that the copy attached to the depositions (Trans., p. 62) was a correct copy of the certified copy, which the witness Chandler had had, and which he says was lost in Cummins' creek, we will be stating the proposition most favorably to the defendant in error.

Assuming, then, for the sake of argument, that the contents of the original records can be found by proving the contents, not of such original records, but of the *lost* copies of them, then we hold, that had the alleged certified copy itself been produced, it would have proved nothing, for the reason that it contradicts itself and shows its inaccuracy and unreliable character on its face, in this, that it asserts the judgment to have been for $43,966 $\frac{34}{100}$ in one part, and in the conclusion it asserts it to have been for $43,936 $\frac{34}{100}$, another and different sum. Again, in the body it asserts the judgment to have been rendered on the 12th of July, 1858, while the alleged certificate of the clerk to the correctness of said judgment is dated on the 5th of April, 1858, some three months before the judgment is supposed to have been rendered. (Trans., p. 62.)

If the defendant in error had shown that the certified copy of the judgment which Chandler had, and which was lost, was the same one that witness Ballinger, in 1859 or 1860, had advised him to procure, and which, from Mott's evidence, was ranked as a claim, and in satisfaction of which the land in suit was sold, and had also accounted for its being in his possession, instead of on the files of the probate court of Galveston county, with the other vouchers of S. M. Williams's estate, it might then have been proper to allow the evidence to be used, loose and unsatisfactory as it was. But, under the circumstances, the objection taken below, "that the alleged certified copy of the judgment contradicts itself," should have been sustained. For in the absence of evidence showing the date attached to the clerk's certificate to have been a clerical mistake, the fact that Levi Jones' certificate bears date in April, three months

before the judgment was rendered, was sufficient to discredit the alleged copy of the certified copy. Besides, the witness Ballinger discredits it, in speaking of it thus:

"When John H. Williams informed me this day that he wished me to give my deposition in this case, he handed me what purports to be a copy of a certified copy of a judgment in the said case, on the back of which I have written my name. I cannot say that said copy is accurate, and I notice the amount found due by the clerk, and that for which the judgment was given, vary." (Trans., p. 63.)

Without explaining these discrepancies, and showing them to be mere clerical errors, if such they were, we think it was error to allow the copy of the certified copy to be used in evidence.

3. The third objection was, that the defendant in error, in attempting to prove the judgment by secondary evidence, had not complied with the law of the State of Texas on this subject.

This proposition has already been discussed under a preceding head, where we have shown that the defendant in error failed to comply with the acts of Texas and of Congress there cited.

4. The fourth objection was, that the defendant in error failed to produce the certified copy of the judgment which was presented, allowed, and approved.

We have already shown, from the statutes and decisions of Texas, that in order to give the judgment any validity after the death of S. M. Williams, a certified copy of the judgment, duly sworn to, had to be presented to and allowed by the administrator, and approved by the probate judge; and that, when paid, these proofs of debt constituted the vouchers of the administrator for his settlement with the probate court, and would appear on its records.

In *Davenport* v. *Lawrence*, 19 Tex. 317, it is held, that "the proper practice in allowing or rejecting claims against an estate by the chief justice is, to enter an order on the minutes of the court."

For these reasons, and others heretofore adduced, we

think it was incumbent on the defendant in error to produce, or else to show the loss and destruction of, the certified copy of the judgment which the law required him to present to the administrator and probate court, and which he must have had, or his claim could never have been legally ranked as a debt against the succession of S. M. Williams.

5. The fifth objection is to the effect that even if the defendant in error had complied with the laws of Texas and of Congress, and exhibited a certified copy of the judgment, after it had been shown to exist, or accounted rationally for its non-production, still the evidence as to its existence would not avail him, unless he could show that he had made oath to the claim, had presented it to and had it allowed by the administrator, and approved by the chief justice: all these being necessary to give it judicial standing.

We must presume that the defendant in error had an object in view in making the proof that he offered to make, and that the court conceived the fact sought to be proved as one relevant and pertinent to the issue in hand, or it would not, after objections were interposed, have permitted the evidence to be introduced.

We may safely assume that that object was to show that there was, at the date of the alleged sale by the administrator of S. M. Williams to the defendant in error, a valid subsisting debt against the estate; and it is difficult to conceive of any other purpose that the introduction of this proof would subserve.

But that object we have already shown by a reference to the cases of *Cole* v. *Portis*, 18 Tex., 157, and *Danzey* v. *Swinney*, 7 Tex., 626, and *Birdwell* v. *Kaufman*, 25 Tex., 192, could not be attained by introducing the judgment alone, for these authorities expressly hold that such a judgment is no evidence whatever that it constitutes a debt in favor of the defendant in error against the estate of S. M. Williams, until it has been duly sworn to, presented, allowed, and approved, as other claims have to be.

We believe, then, that the court erred in allowing the secondary evidence of the judgment of H. H. Williams against S. M. Williams to go to the jury.

V.

The fifth assignment of error brings in review the action of the court below, in permitting the deeds of the 15th of April, 1866, of the 2d of January, 1868, and the release of the 15th of April, 1866, to be read in evidence, as the record showed a want of power and authority in the court to order the deed to be made, and the court erred in the charges given, and in refusing those asked by the plaintiff in error, concerning the legal effect of said deeds.

The facts disclosed by the record, necessary to be stated for a proper understanding of this assignment, are as follows:

On the trial it was admitted that both the defendant in error and S. S. Connett claimed the premises in controversy under the intestate, Samuel M. Williams. (Trans., p. 21.)

The defendant in error, in support of his title from that source, set up certain proceedings of the probate court of Galveston county, had in the matter of the succession of S. M. Williams, deceased, beginning with an application made on the 21st of January, 1866, by J. H. Williams, "as the agent and representative in Texas of his father," (Trans., p. 21,) H. H. Williams, asking for a citation to the administrator of S. M. Williams, to show cause why he (the administrator) should not make application to the court for an order to sell enough of the property of the estate to pay a judgment obtained by the defendant in error, H. H. Williams, against S. M. Williams, for the sum of $40,000, which judgment he alleged had been allowed and approved as a valid claim against said estate in October, 1859, with interest at eight per cent. per annum; and in case the administrator failed to appear and show cause, then the said J. H. Williams moved the court to order the sale of sufficient property to pay said debt and interest.

The next day after the date of this application, the administrator accepted service of it, and entered his appearance on the 30th of January, 1866. (Trans., p. 21.) The answer of the administrator, P. C. Tucker, set forth that on June 2, 1850, the defendant in error, H. H. Williams, recovered a judgment in the United States District Court at Galveston, against S. M. Williams, for the sum, not of $40,000, as alleged in the motion, but for a materially different sum, to wit: $26,736. The administrator then goes on to say that this judgment, rendered on the 2d of June, 1850, for $26,736, had not been paid at the death of the decedent, and had been presented to him for allowance, accompanied by the usual affidavits; that he (the administrator) had allowed it for some amount, *but he could not say whether the same was ever approved by the chief justice of Galveston county;* that it was his custom to register all claims presented to him, but that on examining his register in reference to this claim, he found only a memorandum of its being presented, *but no statement of the amount for which it was allowed,* and he suggests that the creditor be held to strict proof.

He states that the reason he never paid it before was because the defendant in error had often assured him that, as it was a matter between brothers, its collection would never be pressed. (Trans., pp. 21, 22.)

On January 31, 1866, the court entered the order of sale under which the defendant in error claims. So much of this order as it is material to consider is as follows: (Trans., p. 22.)

"On this day came on to be heard in this cause the motion of Henry H. Williams, by his agent, John Williams, asking that the administrator be required to sell sufficient property of the estate to pay a certain judgment obtained by the said Henry H. Williams in the United States District Court, on the 28th day of June, A. D. 1850, for the sum of twenty-six thousand seven hundred and thirty-six dollars, with interest from date of rendition; and it appearing to the court that this claim has been duly *allowed* * * * on terms of sale, as required by law, to the highest and the

best bidder, on a credit of twelve months, the purchaser to execute his note and bond for security of the payment, when due, and a vendor's lien reserved." * * *

On March 15th, 1866, the administrator reported that he had sold the land in suit on the first Tuesday in March, 1866, and that the defendant in error had become the purchaser for $60,000, on a credit of twelve months, secured by the vendor's lien. (Trans., p. 23.)

The sale was confirmed by the probate court on the 30th of March, 1866. (Trans., p. 23.)

On the 15th of April, 1866, the administrator, P. C. Tucker, attempted to execute to the defendant in error a conveyance of the land in suit, in which he set forth that he made the deed by virtue of an order entered, not at the January term, (January 31, 1866,) but at the February term, 1866, of the probate court of Galveston county, and that the sale had been confirmed by an order entered, not at the March term, 1866, (30th of March, 1866,) but at the April term, 1866, of said county.

On the 15th of April, 1866, the same day that the deed reserving the vendor's lien was made, the administrator executed an instrument purporting to be a release of the vendor's lien to the defendant in error, reciting that the purchase money had been that day paid to him (the administrator) in cash. (Trans., pp. 25, 26.)

On the 2d January, 1868, the administrator made another deed to the defendant in error, in which he recited that this deed was made to correct several clerical errors as to date that had occurred in his former deed of the 15th of April, 1866. And in this last instrument he sets forth the order of confirmation in full, as made, not in April, but in March, and he now recites the order of sale to have been entered at the January term, and not at the February term, of the probate court. (Trans., pp. 26–28.)

To the introduction in evidence of these proceedings of the probate court, and of the two deeds of April 15, 1866, and January 2, 1868, as well as of the release of April 15, 1866, the plaintiffs in error objected—

"Because the formalities and acts required by law to give the probate court jurisdiction and power to order the sale were not shown; because, 1, the application for the sale was not made by the administrator, nor did it appear that the administrator had refused to make the sale; 2, because there did not appear to have been made to the court, or brought before it, a statement or exhibit of the condition of the estate before the order was made, as required by law in cases where the administrator declines to sell, and a sale is sought to be had, on the motion or application of a creditor; 3, because it affirmatively appears on the face of the record that the plaintiff, at the time of his application, was no such creditor of the estate as had a right to apply, and it appears affimatively that there was no such authority in the court to order a sale for the payment of this debt, it not appearing from the record that his debt was established in the mode required by law, the record not disclosing that his debt was duly sworn to, allowed by the administrator, and approved by the chief justice, the order of sale reciting the sale to have been made on a claim allowed, and not on a claim allowed by the administrator and approved by the chief justice; and because the record fails to show the amount of his debt, or the date of its allowance by the administrator, or the date of its approval by the chief justice; 4, because the judgment debt for which the court ordered the land to be sold, being one for $26,736, with interest from the 28th of June, 1850, to date, is a different debt from the judgment debt of $40,000, set up by the plaintiff in his said application for a sale; 5, because the deed of April 15, 1866, purports to be made by virtue of an order made at the February term of the court, and no such order was made.

"For all these reasons the said defendants objected to the introduction of the first deed of the administrator, bearing date April 15, 1866, and all the proceedings on which it purports to be based.

"And to second administrator's deed, dated the 2d of January, 1868, in addition to all the foregoing objections, it was further urged, that said deed was void, and was incompetent to establish any right, because, 1, no order of court was produced showing any authority in the administrator to execute such an instrument; 2, because, having already executed a deed, (dated April 15, 1866,) the administrator was, as to that matter, *functus officio*, and had no power, without an order of court, to execute another deed

for the same property; 3, because the deed did not convey the legal title to the plaintiff, being nothing but the private deed of P. C. Tucker; 4, because the demise is laid in the petition on the 1st of January, 1868, and this deed is dated after that date, and on the 2d of January, 1868.

"The defendants objected to the release because it was made without the authority of law, and in violation of the order recited.

"The defendants objected to all and each of these instruments, as failing to show power or authority in the administrator to convey the land to the plaintiff." (Trans., p. 29.)

The evidence of M. F. Mott, and the entire, full, and perfect proceedings of the probate court of Galveston county, in the matter of the succession of S. M. Williams, were also introduced. (See Trans., pp. 20 to 53.) So much of Mott's evidence, and of the probate court records, as it may be necessary to refer to, for a full understanding of the bill of exceptions, will be set out when the question as to the jurisdiction and power of the probate court to make these orders comes to be enquired into; as also the instructions asked by the plaintiffs in error, and refused by the court, and the charge delivered by the court on this point.

In the meanwhile, and as more convenient, it is deemed best to divide the questions involved; and before considering the jurisdiction and powers of the probate court to order and confirm the sale under consideration, we will discuss the admissibility of the two deeds of the administrator, of the 15th of April, 1866, and of the 2d of January, 1868, and of the release of April 15, 1866, and assume at present, for the sake of argument, that the probate court had full and ample jurisdiction in the premises, and that the sale was made in the lawful exercise of that power; and such objections to the introduction of these deeds as raise the question of the authority of the probate court, will be discussed separately, in connection with the question of jurisdiction.

Deeds and Release of the Administrator.

The first objection, then, to the admissibility of the first

deed of April 15, 1866, is, that the administrator shows no authority for making it. An administrator in Texas is but the creature of statute, and can exercise no power over an estate, except such as may be conferred by our probate act, (and only in the manner thus conferred,) which has been held to constitute a complete system in itself.

Green v. *Rugeley*, 23 Tex., 539;
Birdwell v. *Kaufman*, 25 Tex. 192, 103.

To show authority for making the deed of April 15, 1866, the administrator must not only exhibit the order of sale, but, in addition, the order of confirmation must be *recited* by him in his deed. (Paschal's Dig., art. 1327, provides "that after any such decree of confirmation shall have been made, * * * the administrator shall execute a conveyance, * * * *reciting therein the decree* confirming the sale.")

In the deed under consideration, the administrator sets forth that he made it by virtue of an order of sale made at the February term 1866, (but fails to recite the order itself,) and confirmed at the April term 1866, (without reciting the order of confirmation, as required.)

This deed was objected to, because the administrator failed to show any order of sale made at the February term 1866, and confirmed at the April term 1866, as he claimed to act under.

The court below used the following language: (Trans., p. 55.)

"The objection to the first deed of the administrator, that it recited an order of sale made in February term, instead of January term, 1866, is not tenable. It was a mere clerical error, which does not invalidate the deed; if otherwise, the second deed remedied it.

"I therefore instruct the jury that the administrator's deed was good and valid to convey, and did convey to the plaintiff the title which S. M. Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff in obtaining it."

It is judicially known to the court that the probate court

of Galveston did have a February and also an April term, as the law provides that the probate court shall sit on the last Monday in every month in the year, (Paschal's Dig., art. 1246;) and while it was perhaps competent for the defendant in error to have shown by proof that the deed was made by virtue of an order made at a term different from that recited in the deed, yet the court could not of itself, in the total absence of such proof, assume that it was a clerical error.

The administrator recites one authority for his act, and produces another. For this variance, while unexplained, the deed should have been excluded. At least it was error in the court to assume, in the absence of proof to that effect, that the recital was a mere clerical error.

Nor does the court rely wholly upon this as the ground for admitting it, but bases its admissibility on the fact that these clerical errors were remedied by the deed of January 2, 1868.

This brings us to a fuller consideration of both of these deeds.

The power of the administrator to convey the real estate of his intestate, and thus divest the heirs-at-law of all title, is a mere statutory power, uncoupled with any interest.

In *Mason* v. *Osgood*, 64 N. C., 467, the court say:

"He (the administrator) is a mere agent of the court to execute a *naked* power."

In *Smith* v. *McConnell*, 17 Ill., 140, it is held, "that the administrator takes neither an estate, title, nor interest in the realty. He takes a *power*, and not an interest." Such is the relation in Texas of an administrator to the realty in his charge, and, like all mere naked powers, must be strictly construed.

4 Kent's Comm., marg. p. 330.

In the case at bar, the power of the administrator was based on the order of the probate court. He had the power under the statute, by virtue of this order, to make the deed; and he executed the power so defectively that it is

questionable whether any title passed by it at all. In order to aid this defective instrument, which, without resort to extraneous evidence, was insufficient to show title, the administrator, on the 2d of January, 1868, executed the second deed, correctly reciting the orders of sale and confirmation.

We believe the first deed to be an imperfect instrument, inasmuch as there never were such orders of sale and confirmation produced as it referred to, as a warrant for its execution.

The second deed could not cure it, because the administrator had already acted in the matter, and had exhausted the power vested in him, in a defective manner, it is true, and he was then *functus officio*, unless an order of the probate court had been obtained, setting aside the former order of confirmation, and directing him to make a new deed. And until this was done, he had no power further to act. But even if he had such power, then the deed of January 2, 1868, is the first and only deed conveying the legal title that the defendant in error has produced, executed in accordance with the statute.

This deed was objected to because it purported to be made on the 2d of January, 1868, while the ouster is laid on the 1st of January, 1868. (Trans., p. 1.) The trespass there appears to have occurred before the defendant in error had any legal title.

In *Binney* v. *C. and O. Canal Co.*, 8 Peters, 217, it is said:

"Though the demise is a fiction, the plaintiff must count on one which, if real, would support his action."

It might, perhaps, have been competent, under the direction and authority of the court, for the defendant in error to have stricken out the date of the trespass, and alleged one of later date, but this he did not do; and we submit that he failed to show any order of sale or of confirmation authorizing the administrator to execute the deed of April 15, 1866; and for that reason the first deed offered should have been excluded, and also the second deed, of January

2, 1868, because it showed on its face that the defendant in error had no legal title to the land in suit, when he alleges the illegal entry to have been made, and that he acquired it, if at all, subsequently thereto.

In regard to the introduction of the instrument of release of April 15, 1866, executed by the administrator to the defendant in error contemporaneously with the deed of that date, acknowledging the payment of the purchase money, we submit that the objection to its introduction was good. It was evidently made without authority, and in violation of the policy of our probate law.

By art. 1322, Paschal's Dig., it is provided, that where a sale of an intestate's real estate is made for the purpose of paying debts, the sale, for obvious and sound reasons, shall be made on a credit of twelve months, and that a mortgage and lien shall be preserved on the property, to secure the payment of the purchase money.

The effect of the release, if it had any validity, is to show a sale made, not on twelve months' credit, but for *cash*, and to show a sale made in direct contravention of the order of the court, and in palpable violation of law.

Under the laws of Texas governing the administration of the estates of deceased persons, (Paschal's Dig., art. 1322,) an administrator has not the power to sell real estate for cash for the payment of debts, nor has the court the power to order such a sale.

But if it be held that the effect of the release was nothing more than to waive the security, then the release was equally unauthorized.

In *Smith* v. *Dibrell*, 31 Tex., 243, it is held,

"That without the approval of the chief justice he (a guardian) had no legal right to release the mortgage to the vendee at the sale, by the administrator, and thus attempt to confer upon him (the purchaser) the right to *convey the fee* to Dibrell."

And in *Wright* v. *Wooters*, (Manuscript Opinion, December Term, 1872,) the Supreme Court of Texas say that

"An administrator is required by law, when he sells

property of his estate on time, to take note with personal security, and retain a mortgage on the property. He has no right to waive or compromise away either of those securities."

In *Casey* v. *Turner*, 32 Tex., 64, 65, it is held that

"The powers of an administrator emanate from the law; and therefore, when he sells property belonging to an estate, he can only give credit for lawful money; and he had no right to promise to take Confederate money."

The release, then, was clearly inadmissible in evidence, not only because there was no order of the court authorizing it, but because the law forbids the administrator from executing such an instrument, which practically converts the credit sale, required by law, into a cash sale, contrary to law, and in disregard of the order of the court; and if an administrator can disobey one provision of the order of sale and of the law, he may all others, and hold the orders of the court and the statutory provisions alike for nought. Its execution, therefore, could have no legal effect on the rights of the plaintiffs in error, and it should not have been allowed to go to the jury.

Let us, then, consider the character of the title of the defendant in error, as represented by the orders of sale and confirmation, the two deeds of April 15, 1866, and January 2, 1868, made under them, with the release not executed and not before the court, as it was clearly irrelevant, and with note, mortgage, and lien all preserved.

By the act regulating the estates of deceased persons, it is provided as follows, (Paschal's Dig., art. 1373:) "When a person dies * * intestate, all of his estate *shall vest immediately* in his heirs-at-law."

That the administrator has no interest or title in the estate, and that on the death of the intestate, his property vested *eo instanter* in the heirs, has been repeatedly held in Texas.

Barrett v. *Barrett*, 31 Tex., 346.
Withers v. *Patterson*, 27 Tex., 502.

Ansley v. *Baker*, 14 Tex., 613.
Portis v. *Cole*, 11 Tex., 158.
Chubb v. *Johnson*, 11 Tex., 475.
Blair v. *Cisneros*, 10 Tex., 40.
Fisk v. *Norvell*, 9 Tex., 18.
Peevy v. *Hurt*, 32 Tex., 146-149.
Francis v. *Hall*, 13 Tex., 189.

An examination of these authorities, in which the probate act of 1848 in this respect has been fully considered, will leave no doubt on the question.

Let us, then, apply these principles to the question in hand.

By the death of Samuel M. Williams, the legal title to his estate passed to his heirs, charged, it is true, under the law, with the ancestral debts, and liable to be divested out of the heirs for their payment, unless the heirs assumed and paid them.

Excluding from our consideration, then, as irrelevant and inadmissible, the unauthorized release, the surrender of the lien and twelve-months' note, and the virtual cash sale made by the administrator; the effect of this sale in March, 1866, and its confirmation, and the execution of the deed and mortgage, was to leave the legal title, under the laws of Texas, in the heirs, until the purchaser could show that he had paid the purchase money, according to the terms of sale.

The record shows that both parties to this suit hold under the same title, through Williams. (Trans., p. 17.) In the absence of proof of the payment of the purchase money, and of strict compliance, on the part of the purchaser, with the terms of the sale, has such purchaser the *legal title*, as against the heirs or those holding under them? For, to recover in this action, he must have nothing less than the legal title. In the Texas courts, where the distinctions between law and equity are abolished, in an action of trespass to try title, the plaintiff can recover as well upon the equitable as the legal title. *Peevy* v. *Hurt*, 32 Tex., 153; *Hunt*

v. *Turner*, 2 Tex., 374. But this is not so in the federal courts, where by the constitution, the law and equity jurisdiction is separate. In the circuit court of the United States suits for the recovery of land can only be maintained upon a legal title, and never while the patent remains in the Government, or the legal title in another. (Fenn *v.* Holmes, 21 How., 481.) *Sheirburne* v. *De Cordova*, 24 How., 426; *Vaughan* v. *Chestnut*, 2 Wash., 160; *Simms* v. *Irwin*, 3 Dall., 425. That the plaintiff must recover upon his legal, and not his equitable title in that court, is an elementary principle. (Goodlith *v.* Jones, 7 Term, 49; Doe *v.* Wroot, 5 East, 132; Roe *v.* Head, 8 Term, 118; Robinson *v.* Campbell, 3 Wheat., 221; Parsons *v.* Bedford, 6 Pet., 768, 769; Parrish *v.* Ellis, 16 Pet., 453, 454; Bennet *v.* Butterworth, 11 How., 669.) *Fenn* v. *Holmes*, 21 How., 438, 486. The doctrine is fully explained in these cases.

In Texas, the cases of *Secrest* v. *Jones*, 21 Tex., 132; *Browning* v. *Estes*, 11 Tex., 237; *Baker* v. *Rainey*, 27 Tex., 52; *Dunlap* v. *Wright*, 11 Tex., 597, show that a deed retaining the vendor's lien, as do both the deeds introduced by the defendant in error, does not pass the legal title.

Whatever may be the rule elsewere, it is a rule of real property, firmly fixed in Texas, that the legal title to real estate, on the death of the ancestor, vests instantly in the heirs, and a mere sale by the administrator, retaining a mortgage and vendor's lien, does not divest the heirs of the legal title until the purchase money is paid, in accordance with the law.

In *Duty* v. *Graham*, 14 Tex., 427, and in *Hanney* v. *Thompson*, 14 Tex., 142, it was held that a mortgager cannot recover against a mortgagee in possession, without proof of the payament of the mortgage debt.

In *Caldwell* v. *Fraim*, 32 Tex., 326, the Supreme Court of Texas, in discussing a deed offered in evidence, which, on its face, reserved (as the deeds under consideration here do) the vendor's lien, observes:

"An absolute deed for land gives the right of entry, and also the right of possession, to the purchaser against the

vendor and all the world, except one who may own a paramount title. If the deed relied on is without any reservation, undoubtedly the claim for the possession could not be resisted. The *lien reserved* proclaims the nature of the deed, and announces the terms upon which the title, legal and equitable, is to become perfect. Until then, there is no absolute investiture of title in an instrument like this."

In these deeds, the defendant in error having failed to exhibit the mortgage which the law required him to take, and which he did take, and the existence of which he proved, but failed to show its final payment and satisfaction, he could not maintain this action on the law side of the court. The legal title was first in the heirs, and afterwards in those to whom they had sold.

Under the statute of Texas vesting the legal title to realty in the heirs immediately on the death of the ancestor, no title would pass by an administrator's deed made under an order of court, where considerable time had elapsed after the descent cast, and after the heirs had, in the meanwhile, gone into possession and conveyed the legal title to a stranger for a valuable consideration, and who had in good faith entered upon the enjoyment of the estate.

For it may be stated, from the well-settled principles of law in Texas, that, in the absence of an administration, or where there is no necessity for one; or where, pending one, the heirs so elect, they may partition the estate, or the residue of the estate, by conveyances among themselves, or to others; and that such conveyances pass the legal estate to the grantees in severalty; and if such grantee convey to others, or so incumber the estate as that forced sales take place, as in this case, the administrator cannot recover the estate or disturb it; nor can creditors acquire the legal title through a sale by the administrator; but if such creditors have a *bona fide* debt, which has been duly approved and allowed, their remedy, and their only remedy, is by suit against the heirs, to recover the amounts received by them respectively; and to enforce an equitable lien against the property conveyed by them, and in such suit, the pur-

chaser would be entitled to the equitable defenses of good faith on his part, or laches or bad faith on the part of the creditor. This doctrine rests upon solid law, and it is supported by the soundest principles of equity. It is certainly deducible from the elaborate opinion in *Francis* v. *Hall*, 13 Tex., 189.

In that case, Lakey had died, leaving a will, which, upon the petition of Francis and wife, was duly probated, and Francis appointed administrator. Upon the petition of other heirs, the will was annulled. Pending an appeal, the heirs came to a compromise; appointed Hall agent to sell the chattels, and they partitioned the lands among themselves. Francis and wife were subsequently appointed administrators *de bonis non*, and sued to recover the estate.

Chief Justice Hemphill said, that in a few months after the probate of the will, the heirs agreed to divide the property among themselves; that this was, in effect, an acceptance of the estate by the heirs; that, whether there were debts or not, the heirs had the right, either expressly or by implication, to accept the estate, becoming responsible for the debts; and especially, if there were no debts, had they the right to accept and distribute immediately, without the incumbrance of an administration; that the only object under such circumstances would be to prepare the estate for distribution; and that their act had the effect of closing the estate against general administration, of vesting the property, *sub modo*, in themselves, of leaving nothing to be done except to enforce the execution of the contemplated division; consequently, the court had no competent authority to grant letters of general administration, and the act must be regarded as a nullity. And to this view is quoted

Fisk v. *Norvell*, 9 Tex., 17.
Blair v. *Cisneros*, 10 Tex. 34.

The facts in the two cases are sufficiently analogous to be controlled by the same principle.

Henry H. Williams recovered a judgment against his

brother, Samuel M. Williams, on 28 June, 1850; that judgment slept until 12 July, 1858, when it was revived at the instigation of S. M. Williams' son. S. M. Williams died on 25 September, 1858. That judgment slept again for over six years; and, in the meantime, all other debts, save this dormant claim of Henry H. Williams, had been paid, and he had asserted that it would never be pressed. In the meantime, the heirs had divided real estate, conveying to William H. Williams the land in controversy; he had conveyed one half of it to John H. Williams, the son and general agent of his father, Henry H. Williams. These tenants in common had made upon the estate valuable improvements; had held adverse possession for more than three years from and under the sovereignty of the soil; had created deeds of trust to Puryear and to Connett; had dealt adversely to the estate and its creditors. Then a proceeding is instituted for the removal of William H. Williams from the administration, and, through Tucker, to sell the land to Henry H. Williams. But it is enough that this land no longer remained the property of the estate. It had passed to strangers by the action of the heirs. The legal estate had passed to the trustees, and by execution the equity of redemption passed to Connett, to whom, by the trustees, was subsequently passed the legal title. Therefore, there remained nothing which the administrator could sell, and the remedy of Henry H. Williams was against the heirs, and to follow the legal title, if his equities were superior to Connett's.

This accords with the best principles of the common law.

It was held at common law, at a very early day, (see Jenk. Cent., 184, p. l. 75; Bro., tit. Devise, p. l. 86,) [cited by Chancellor Kent in vol. 4, marg. p. 339 of his Commentaries,] that if a power to sell lands be given to executors, and the heir enters and enfeoffs B., who dies seized, yet the executors might sell, and the vendee would be in under the will, which was paramount to the descent cast, and that the power was not tolled by the descent. Chancellor Kent says:

"A dormant power with such mysterious energy founded on the doctrine of relation, would operate too mischievously to be endured; and the doctrine, to that extent, has justly been questioned, and it would not now be permitted to destroy intervening rights which had been created for a valuable consideration, and had only attached upon the land without notice of the power."

At least the party can be required clearly to show that he has the legal title of the intestate. This, we think, the defendant in error failed to show. To establish that fact, something more was needed than to show that he had bought of an administrator on a credit, and given him a note due in twelve months, and a mortgage on the land for the purchase money.

In *Judson* v. *Sierra*, (22 Texas, 370,) which was an action for the recovery of a tract of land, a guardian's deed (to which the same rules apply in Texas as to administrator's deeds) was offered as evidence of title. It was made under the order of the court, and confirmed; but it was held: that the terms of the sale, as prescribed by law, were not complied with; and that, therefore, no title passed to the purchaser.

We believe, then, that the defendant in error failed to show a legal title to the premises, and that the deed offered in evidence should have been excluded for that reason; and certainly it was error to instruct the jury that it overrode Connett's title.

Jurisdiction of the Probate Court.

The next point to be considered in connection with this assignment is, as to the jurisdiction of the probate court to order and confirm the sale to the defendant in error of the land in suit.

The instructions asked on this point by the plaintiffs in error were as follows:

"If said probate court had not jurisdiction to make said order of sale, then said sale is void, and the plaintiff, by his purchase, acquired no title. The jury are further in-

structed that said court had no jurisdiction to order said sale, unless the claim of the plaintiff, at whose instance and on whose application it was made, had been presented to and allowed by the administrator, and approved by the chief justice; and in determining whether the court had jurisdiction, not only may the record be looked to, but also all the testimony outside of said record which has gone to the jury, tending to prove the existence or non-existence of a claim or debt allowed and approved, as required by law, to give it some standing as a valid claim against said estate." (Trans., p. 53.)

And the court charged as follows:

"But the validity of the order of sale cannot be questioned in this collateral way. This is not a revisory proceeding for examining the regularity or legality of that order. This court cannot set it aside, or inquire into any errors committed by the probate court in making it, if there were any. All it can do is to ascertain whether the probate court had jurisdiction of the succession of S. M. Williams, of which matter this order of sale was a part. But if that was not sufficient to support the order, we have the fact proved that there was a subsisting judgment; that it was duly presented to the administrator for allowance, and sworn to and admitted and registered by him; that the plaintiff applied to the court for an order calling upon the administrator to show cause why he should not apply to have the land sold to pay the judgment, alleging that it had been duly presented, allowed, and approved; that the administrator appeared and answered the application, and that a hearing was had thereupon, and the order made for a sale of the land; that the sale was made, reported, and confirmed, and a deed ordered to be given, which was given accordingly. The application thus made to the court was under and in substantial pursuance with the 1315th article of Paschal's Digest, which declares that when an administrator shall neglect to apply for an order to sell sufficient property to pay the claims against the estate that have been allowed and approved, or established by suit, such executor shall be required by the chief justice, on the application of any creditor whose claim has been allowed and approved, or established by suit, to present a statement, &c.: and on proof that a necessity exists for a sale to pay debts, &c., it shall be the duty of the chief justice to order such sale to be made, having jurisdiction of the case by application

made. It was the duty of the probate court to ascertain whether the exigency existed which justified or required an order of sale to be made. It will be presumed, when brought up collaterally, that the court did its duty, and its judgment will be accepted and received without further question. I hold, therefore, that the order of sale is binding on this court, and that the order confirming the sale and directing a deed to be made, precludes inquiry into any irregularities in the proceedings. A deed by the administrator, in pursuance of the last order, conveyed a good title, unless the proceedings can be impeached for fraud, as thereafter stated." (Trans., p. 54.)

This point has to be determined, not by reference alone to the general principles of law, but by a close examination of the power and jurisdiction conferred on the probate courts by the laws of Texas.

However true it may be elsewhere, it is not the law in Texas that, because by the fact of the death of a party, the jurisdiction of the probate court over his estate attaches *all* its orders made in reference to the disposition of the property, are secure against collateral inquiry by reason of that fact alone. In addition, it must also appear that the court had, by a compliance with the requirements of the law, acquired the power to act upon the particular subject. On this point the Supreme Court of Texas, in *Withers* v. *Paterson*, (27 Tex., 495,) say: "The powers of our probate courts over estates are all conferred by statute. Whatever the statute authorizes the court to do, it may rightfully do. But it does not follow, because the statute authorizes the court to order the sale of land, under certain circumstances, that *all sales of land* by order of the court are authorized. * * * It is certainly true, that if the court orders a sale when the circumstances authorizing the sale do not exist, its acts in doing so are without *jurisdiction*."

Nor does the mere fact, under the laws of Texas, that the probate court had power under the statute to order a sale of land, and did order a sale, preclude inquiry collaterally into its power to make the sale. In *Hamblin* v. *Warnecke*, (31 Tex., 93,) it was held, that though the probate court

had acquired jurisdiction by virtue of the death of the party, and there was a regular application for the sale, and orders of sale and of confirmation, it was not voidable merely, but absolutely void, and that the purchaser acquired no title, because the property was the homestead, and under the act of 1848 (Paschal's Dig., p. 65, note 198) the court had no authority to order a sale of a homestead. The sale was void, because the law did not permit it.

In *Flanagan* v. *Pierce*, (27 Tex., 79,) it was held that a sale under a regular order and application was void, because made, not to pay debts or for partition, but to raise funds to pay certain expenses. This sale was held absolutely null, because the statute did not authorize it. In *Withers* v. *Patterson*, (27 Tex., 491,) it is said:

In *Hurt* v. *Horton*, (12 Tex., 285,) it was held that a sale was null and void, though there was a regular application and an order of sale, because the property had already been sold, and did not belong to the estate, which we insist is the precise case here.

In the second important case of *Delk* v. *Punchard*, (MS. opinion, Dec. Term, 1871, Sup. Court of Texas,) in a collateral proceeding, the decree of partition was held null, because the land did not belong to the estate.

And the cases below enumerated are all cases in which the great jurisdictional fact of death existed, and also the further jurisdictional facts of petitions and orders of sale and of confirmation, and when the sales were held to be void, because the power did not exist to make the sale.

Turner v. *Hart*, 10 Texas, 441.
Hamblin v. *Warnecke*, 31 Texas, 91.
Hamilton v. *Pleasants*, 31 Texas, 340.
Lovering v. *McKinney*, 7 Texas, 523.
McMahan v. *Rice*, 16 Texas, 337.
Wardrup v. *Jones*, 23 Texas, 494.
Langworth v. *Baker*, 23 Illinois, 484.
Bishop v. *Hampton*, 15 Alabama, 761.
Thornton v. *Mulquin*, 12 Iowa, 549.

All these cases go to show that, although there may exist an order of sale, an inquiry can still be made as to whether the facts existed which gave the court the power to act. And where the action is contrary to law, or forbidden by it, its orders are null and void.

Suppose there be no debts at all proved against a solvent estate, and the property should be ordered to be sold to pay unproved debts? Would such a sale be unimpeachable in a collateral proceeding? Could it not be shown, that the court could not order the sale? That it is forbidden by art. 1314 of Paschal's Digest? Suppose the debt had been proved, ranked, and already paid, and yet the administrator applied for, and the court granted, an order of sale for the payment of these extinguished liabilities, would such an order be beyond the reach of collateral inquiry? or would it not be a nullity, for want of power in the court, under the law, to enter such an order?

The court below held, in the case at bar, that the mere fact that the probate court had ordered the sale of the land in suit on the application of the creditor, is conclusive of the question whether he occupied that attitude, and that there is an end to the inquiry. Were this so, no decree could ever be collaterally attacked, for want of jurisdiction, provided the framers of it took the precaution to recite all the jurisdictional facts.

We most respectfully submit that this ruling of the court below was, in this respect, erroneous.

Let us see how jurisdiction is acquired, under the act of 1848, for the purpose of selling real estate. We have already attempted to show that the mere fact of death, or of unpaid claims, or of the existence of a power to sell, is not sufficient to authorize the court to order the sale.

What, then, is sufficient? The statute answers this question. The probate court has no jurisdiction or power, in any case, to order a sale of land for the payment of debts or claims against an estate, until (1) the claim has been sworn to by the holder or his agent, (2) presented to the administrator, (3) by him allowed, (4) and finally presented

to the probate judge, and by him approved. (Paschal's Dig., arts. 1307, 1314.)

On this point it is held by the Supreme Court of Texas, in *Walters* v. *Prestige*, (30 Tex., 71,) and in *Fulton* v. *Black*, (21 Tex., 25,) that to authenticate a claim, it must be presented to the administrator and approved by the chief justice, and until this was done, it could not, in any sense, be said to be properly authenticated.

Price v. *McIver*, 25 Tex., 551.

This combined action of the holder, the administrator, and the probate judge, is essential to give a claim judicial standing. Speaking of this act of ranking a claim, the Supreme Court of Texas, in *Davenport* v. *Lawrence*, (19 Tex., 320,) said "it involves an act of judgment founded on facts in evidence."

This ranking of the claim is an exercise of judicial power, and is a judgment of the court over which, at a subsequent term, it can have no control, (see *Heffner* v. *Branden*, 23 Tex., 681,) and which must, in every instance, *precede* the creditor's application for an order of sale.

See also *Eccles* v. *Daniels*, 16 Tex., 139; *Pittner* v. *Flanagan*, 17 Tex., 9; *Finlay* v. *Carothers*, 9 Tex., 517.

It constitutes a judicial proceeding occurring in the due course of the administration of the estate, and must, in every instance, be evidenced by the action of the court before the claim becomes a debt or the creditor can invoke any action of the probate court on it.

In *Birdwell* v. *Kaufman*, 25 Tex., 192; and in *Hall* v. *McCormick*, 7 Tex., 275, it is expressly held that judgments rendered against an intestate in his lifetime stand on the same footing as all other debts or claims, and have to be sworn to, presented, allowed, and approved.

See also *Bulware* v. *Jones*, MS. Opinion Sup. Court of Texas, December Term, 1872.

In order, then, to give the court authority to order a sale for the payment of debts, it must appear from the records that due and solemn judicial action has been had on the claim. If this be not so, then, in the absence of all debts, if the order of the court recite the existence of debts, the sale would be good. Certainly, such never was the intention of the framers of the law, and such has never been its construction in Texas.

The defects in this sale are apparent. The creditor comes into court and claims that he represents a debt for $40,000, which had been duly sworn to, presented, allowed, approved, and ranked as a just debt against the estate in October, 1859. (Trans., p. 46.) If this was so, or if the record disclosed it to be so, (whether it, in truth, was so or not,) no matter with what irregularity, or error, or fraud, or forgery, or perjury, the judgment appearing and ranking the debt had been obtained; until set aside, this judgment declaring the $40,000 claim (if such judgment is shown to exist) to be a debt, could not be attacked collaterally, because the probate court had the power, and it was within the line of its duty to rank the claim and pass on it. And an order for a sale and a sale, for the purpose of paying such fraudulent claim so approved and ranked, would come within the rule laid down by the court in its charge, and could not be attacked collaterally, except for fraud, because the court had the power to make such a sale.

"It is to be borne in mind that, while the county court has power to order the sale of land, it has no general powers to sell the lands of any estate. Its power to order the sale of th lands of any estate *lies within very narrow limits.*"

This claim, however, alleged to have been ranked as a debt for $40,000, in October, 1859, so far from being shown to exist by the record, as should have been done by the production of the claim duly allowed and approved, was not produced, and the administrator denies not only the allowance and approval of the debt for $40,000, but scouts its very existence, and alleges that, at some unknown pe-

riod, a claim, not for $40,000, but for $26,736, by virtue of a judgment rendered on the 28th of June, 1850, (which was then clearly barred,) was presented to him; that he believed it just, and allowed it for some amount, but what amount he cannot tell, and knows nothing of its being approved by the chief justice.

Now, in this proceeding the court was not called upon to determine whether the claim was just or not; that matter, under the law, as we have shown from the authorities, it was its duty to have previously determined in another judicial proceeding, and having determined it, it had no power to reconsider its own decision.

See *Neill* v. *Hodge*, 5 Tex., 490.

If the judgment ranking the claim existed, it had the power to act, and if it did not, then it could not act for want of a claim before it. The order of the court recites what was done. The petition of the creditor recites that a judgment for $40,000 existed, which had been duly allowed and approved as a valid claim against the estate. (Trans., p. 46.)

By the terms of the adjudication, it will be perceived that the court decided that no such claim as that set up by the creditor, as amounting to $40,000, and to have been duly presented, allowed, and approved, in October, 1859, existed; and having so decided, it adjudged itself, and showed by its own record a want of power to make the sale.

But instead of staying proceedings after the investigation had terminated adversely to its power to act, the probate court proceeded (all this being apparent on the face of the record) to require the administrator to sell sufficient property to pay a certain judgment, rendered on the 28th of June, 1850, in favor of the defendant in error, H. H. Williams, for $26,736, and not for $40,000, it appearing to the court that this claim had been duly *allowed*! Mark the language, not that the claim had been duly allowed and *approved*, but only allowed.

The probate court followed the statement of the admin-

istrator, that it had been *allowed* by him, but not *approved* by the chief justice. This shows upon its face that the sale was ordered to pay a claim that had been *allowed;* (such is the recital,) but not *approved.*

The record imports no more upon its face; it discloses an order of sale based upon the fact that the claim was *allowed.* Such a sale is absolutely void. Under our probate laws, a claim sworn to, presented, and allowed, but not approved, such as the order of sale declares this to be, has been held in Texas, again and again, "not to form the basis of judicial action."

The reasoning of the court below in this case is, that as the question of the existence of the claim was brought before the probate court, the mere fact that it assumed jurisdiction and acted, precludes all further inquiry.

On this point Mr. Bigelow, in his recent work on Estoppel, p. 137, quoting from the opinion of Judge Sanderson in *Hahn* v. *Kelly*, says:

"Pushed to its logical results, this doctrine, without some qualification, becomes equivalent to a rule: that the judgment of a court of superior jurisdiction *cannot be attacked at all* in a collateral action, notwithstanding a want of jurisdiction may appear on the face of the record."

We think the whole record before the court fails to show or even to recite that any such claim had ever been presented, allowed, and approved, a fact susceptible of the easiest demonstration, as the claim was the voucher for the large amount paid, and constituted, for the protection of the heirs, the administrator, and the other creditors, an important paper in the probate proceedings, and if in existence must have been on file, or in the possession of the court or of the administrator, or at least easily accessible to all.

But even had the order, on its face, failed to disclose that fact, we believe it was competent to show by extrinsic evidence the want of power. In *Webster* v. *Reid*, (11 How., 460,) it was held that extrinsic evidence may be received

to show the want of jurisdiction of the court rendering the judgment.

See also *Gondy* v. *Hall*, 30 Illinois, 109.
Johnson v. *Wright*, 27 Georgia, 555.
Starbuck v. *Murray*, 5 Wend., 148.

And now, in lieu of the rule laid down by the learned justice who tried the cause, we cite the uniform rule established by this court and the Supreme court of Texas.

In the absence of jurisdiction, the Supreme Court will not respect its own or any other judgments. That an appellate court has the power to revise the judgments of other tribunals, but not its own, after the expiration of the term. And that the question of jurisdiction is always open to collateral attack, whenever and wherever such judgment is offered as evidence.

Horan v. *Wahrenberger*, 9 Tex. 319.

There are repeated recognitions of the general rule as to the legal consequence of the want of power, whether the jurisdiction be general or special.

In *Voorhies* v. *Bank of the United States*, 10 Pet., 474, it is said, in substance, that the only difference between the Supreme Court and other courts is, that no court can revise the proceedings of the Supreme Court; but that that difference disappears after the time prescribed for a writ of error or appeal to revise those of an inferior court of the United States or of any State. They stand on the same footing in law. If not warranted by the Constitution or law of the land, the most solemn proceedings of the Supreme Court can confer no right, which is denied to any judicial act, under color of law, which can properly be deemed to have been done *coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority.

In *Williamson* v. *Berry*, 8 How., 540, it was declared to be a "well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may

be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of the States." (*Glass* v. *The Sloop Betsy*, 3 Dall., 7; *Rose* v. *Himely*, 4 Cranch, 241; *Wilcox* v. *Jackson*, 13 Pet., 499; *Lessee of Hickey* v. *Stewart*, 3 How., 750.) The rule thus stated is sufficiently broad to cover the judgments of all courts, unless, indeed, there be a court whose jurisdiction is unlimited. *Horan* v. *Wahrenberger*, 9 Tex. 313, 319.

Thus, in this case of *Horan* v. *Wahrenberger*, H. had sued W. for a debt before a justice of the peace, and obtained judgment. W. appealed to the district court, under a statute allowing it. (Paschal's Dig., art. 1546.) Upon a trial *de novo* the judgment was for W. H., in his turn, appealed to the Supreme Court, which reversed the judgment of the district court, and rendered a judgment against the defendant, in accordance with the judgment of the justice, upon which judgment an execution was issued, and the property of the defendant was sold and purchased by the plaintiff, who brought ejectment, when the defendant attacked the judgment and sale, upon the ground of want of jurisdiction in the district court to entertain an appeal from the justice, and consequently the same want in the Supreme Court. Upon the principle in *Titus* v. *Latimer*, 5 Tex., 433, it was held that the judgment of the Supreme Court was without jurisdiction, and a nullity. (4 Phillips's Ev., Cow. & Hill's Notes, 12, 206, 214; *Elliott* v. *Piersol*, 1 Pet., 328, 340; *Webster* v. *Reed*, 11 How., 427.)

If this be not the correct rule, there would be practically an end of all collateral inquiry into the legality of judicial proceedings.

The question presented is, whether, when the law prohibits a sale to be made except for the payment of debts

established in a certain manner, and declares null all d not so established, a sale made to pay a debt not established in accordance with law is void?

We think the question answers itself, and that the court in holding that because the court acted, this precluded all collateral inquiry as to its power to act, practically held, in the criticism of Mr. Justice Marcy, in 5 Wendell, 148: "the paper declared on is a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle."

It will be perceived that the order of sale recites a different debt as the basis of its action from the one set up in the creditor's application; the creditor basing his application on a debt of $40,000, while the court recites one for $26,736 which had never been approved.

In *Frazier* v. *Steinrod*, 7 Iowa, 340, it was held, that where there was an application for the sale of one tract of land, and the order was for the sale of a different tract, such an order was absolutely *void*.

See also *Weed* v. *Edmunds*, 4 Indiana, 468.

Under the probate act of 1848, it is not in the power of the court, on an application by a creditor for a sale for the payment of one debt, to order a sale for the payment of another and different debt.

In fact, in *Green* v. *Rugeley*, 23 Tex,, 548, it was held, that the probate act of 1848 was a complete repeal and revision of all former probate acts, and formed a system complete in itself, and in many respects different from those previously in force.

See, to the same effect, *Birdwell* v. *Kaufman*, 25 Tex., 152.

Under the former acts, as will be seen by reference to the acts themselves, and to *Duncan* v. *Rawls*, 15 Tex., 502; *Rose* v. *Newman*, 26 Tex., 133; and *Hurt* v. *Horton*, 12 Tex., 285; 7 Tex., 242; 4 Tex., 446; 10 Tex., 332, where these former acts have received judicial construction, a

different mode was provided for the sale of real estate to pay debts from that provided by the act of 1848. This latter act was evidently intended to prescribe the mode and manner of the sale of real estate, and to forbid sales made in any other manner.

Where the sale is made in the due course of the admintration, upon the application of the administrator, for the purpose of paying debts which have been sworn to, presented, allowed, and approved, in the manner required by the 47th section of the act of 1848, (Paschal's Dig., art. 1307,) the course of proceedings is plain, and is as follows:

"The administrator, so soon as he finds it necessary, applies in writing to the probate judge, at some regular term of the court, for an order to sell so much of the real property of the estate as will be sufficient to pay the expenses of the administration, and the debts of the estate. It in every instance shall be accompanied by a statement under oath, in writing, of the estimated expenses of administration, and a list of all the claims against the estate that have been presented to him; and on this the sale is ordered, if deemed necessary." (Paschal's Dig., art. 1314.)

This is the course pursued when the sale is made for the payment of debts upon the application of the administrator; and in such a case an application from the administrator, setting forth these facts, would give the court jurisdiction; and an order made under such circumstances, however irregular or unjust, could not be impeached in a collateral proceeding, because the probate court, by the provisions of the 54th section of the act of 1848, (Paschal's Dig., art. 1314,) on the application of the administrator, has the power to order the sale.

But the case is very different where the administrator refuses or neglects, as in the case at bar, to make the application for the sale, and denies that the party seeking the order of sale belongs to that class of persons over whom the probate court has jurisdiction; for under the act of 1848 it is not every creditor who can be heard in the probate court, but only such as have proved their claims in accordance with the act. In this respect it resembles the

present bankrupt act, which recognizes only such creditors as have proved their debts in accordance with its provisions. In other words, the creditor must have the *quasi* judgment before he can be barred.

In such a case, where the administrator refuses to apply for an order of sale, in order (as we insist, and we believe we have shown that this is the proper construction of the probate law of 1848) to give the court *jurisdiction* to order the sale, the *record* must disclose: 1. That the claims sought to be enforced have been duly sworn to, presented, allowed, approved, and ranked as debts. 2. That, after being thus duly ranked, the administrator neglects or refuses to apply for an order to sell property to pay for them. 3. The creditor must apply, not as was done in this case, for a sale, but for an *order* requiring the *administrator* to make a sworn statement in writing of the expenses, and of all debts that have been allowed, approved, and ranked. (Paschal's Dig., art. 1315.) 4. Citation must issue to the administrator. 5. There must be proof that a necessity for the sale exists; and the action of the court must be based upon the administrator's tableau or exhibit of the debts and assets, and not upon the petition of the creditor.

In the present instance, however, this was not done: the record affirmatively shows, and the certificate of the clerk asserts the transcript from the probate court to be "a true and perfect transcript of the original papers and proceedings filed and had in the matter of the succession of Samuel M. Williams, deceased, as fully and completely as the same remained opened and on file in my office," (Trans., p. 53,) and it discloses the fact that no such claim as the creditor sets up for $40,000 was ever presented, allowed, approved, and ranked as a debt; but that the sale is ordered for *another* claim, which had been *allowed*, but not *approved*.

The record discloses no such debt, and on its face shows a want of jurisdiction, and comes within the rule laid down in *Flanagan* v. *Pierce*, 27 Tex., 79; and in *Withers* v. *Patterson*, 27 Tex.. 497, where it is said, that when the record

shows a want of jurisdiction, presumption in favor of the record cannot be indulged.

To illustrate the matter more fully, reference may be made to sales under the former probate acts. The case of *Miller* v. *Miller*, 10 Tex., 319; and *Allen* v. *Clark*, 21 Tex., 405; and *Alexander* v. *Maverick*, 18 Tex., 195, were cases in which the probate act of January 16, 1843, came under consideration, and it was there held that the 1st section of that act (Paschal's Dig., art. 1314) *did*, and that it *did not* require the administrator to petition for the sale of the land, as will be seen from an examination of the conflicting cases above cited.

See also *Graham* v. *Vining*, 2 Tex, 442.

The provisions of the statute were as follows:

"In no case shall an administrator be required to sell any other property than that of a perishable nature, * * * any law in existence to the contrary." (Paschal's Dig., note 489, p. 317, vol. 1.)

In *Finch* v. *Edmunds*, (9 Tex., 515,) the probate act of 1846 was considered. Its requirements as to a sale were as follows (Paschal's Dig., note 490, p. 317,): "When a sale of lands becomes necessary for the payment of debts, application shall be made by a petition in writing;" and in that case, there being no petition for a sale, it was said that "the order to sell the land, as stated in the declaration of the plaintiff, was *void* for want of jurisdiction, it having been made without the petition required by law."

In *Littlefield* v. *Tinsley*, (26 Tex., 357,) which was also the case of a sale under the act of 1846, the court held, that though there was an order of sale and confirmation, yet the sale was a nullity, for want of notice to the heirs.

Crawl v. *Meem*, 8 Gratt., 491.

Hawkins v. *Hawkins*, 28 Ind., p. 66.

In the construction given to the power of the probate court to order sales under the act of 1836, 1840, 1843, 1844, and 1846, for the reason that at those dates the republic of Texas and also the State were convulsed by wars with

Mexico and with the Indians, the most liberal rules were adopted for the purpose of upholding probate sales, the court having applied to them what has often been called the "gunpowder" argument, because, in *Burditt* v. *Silsbee*, (15 Tex., 617,) the court, speaking of these early sales under laws prior to the well-considered act of 1848, says: "If such a purchaser is not protected, then, as was said by the Lord Keeper, in *Windham* v. *Windham*, (3 Ch. R., 12,) where a like attack was made on a sale, 'you blow up with gunpowder the whole jurisdiction,' and here, if the protection be denied an honest purchaser, you lay a train of gunpowder through the whole state, and this decision would be the signal to set it off."

Previous to the act of 1848, there had been no precise definition of the powers and duties of the probate courts. Previous to the act of the 20th December, 1836, (Paschal's Dig., art. 1225,) by the ordinance of January 22, 1836, (Hart. Dig., art. 983, and Paschal's Dig., art. 1350,) they acted under the Mexican laws. See *Baker* v. *Coe*, (20 Tex., 435.) By the ordinance of January 22, 1836, (Paschal's Dig., art. 1350,) the Louisiana Code was adopted, and this successively changed, repealed, or modified by the acts of December, 1836, 1840, '41, '43, '44, (Paschal's Dig., arts. 1350, 1314, and note 489,) and these were further modified by the acts of 1846, (Paschal's Dig., note 490, p. 317.)

Accordingly, it was found necessary to apply the most liberal rules for the purpose of upholding these sales. Had the courts adhered to the decisions originally announced in *Flores* v. *Howth*, 5 Tex., 331; *Fisk* v. *Norvel*, 9 Tex., 13; *Boyle* v. *Forbes*, 9 Tex., 35; *Miller* v. *Miller*, 10 Tex., 332, it may safely be said that not a probate sale in the limits of the Republic, made between 1835 and 1842, and even 1843, could have stood these tests. Hence these earlier decisions, under the acts of 1836, 1840, 1841, 1842, 1843, 1844, 1845, and 1846, do not and cannot be said to apply to the more recent proceedings of the probate courts under the carefully digested act of 1848.

In the case at bar, the doctrine of presumption in favor

of the correctness of the record cannot be indulged at all, for the whole record and proceedings are before the court. They disclose the fact that no such debt was ever sworn to, presented, allowed, approved, and ranked, as the one set up; and that the sale was made on a debt *allowed*, but never *approved;* and the naked question presented by the record is, has the probate court authority, under the act of 1848, to order a sale to pay a claim which is not a debt, which has no judicial standing?

Had the record recited that the claim was duly allowed, approved, and ranked against the estate; or had it been even shown *dehors* the record that such was the fact; or had the record been entirely silent on the subject; then the charge of the court, to the effect that (Trans., p. 54,) all that could be done was to ascertain whether the probate court by law had jurisdiction of the succession of S. M. Williams, might perhaps have been sustained.

But in the teeth of the record asserting that the sale was upon an *allowed* claim, (but not an *approved* one also,) and in the absence of proof that such an allowed and approved claim appeared among the papers of the probate court, as should have been done, the court could not act. Freeman on Judgments, page 98, says:

"But no presumptions in support of the judgment are to be allowed in *opposition* to any statement contained in the record."

We believe there is no room for presumptions in this case. The record disclosed on its face a want of jurisdiction and power in the probate court.

According to the authorities, as grouped in Bigelow on Estoppels, page 141, and in Freeman on Judgments, 111, it would seem that evidence, outside the record, would not be allowed to show want of jurisdiction, where the record recites on its face that it has jurisdiction. The correctness of this general rule has been powerfully assailed by Mr. Justice Marcy, in *Starbuck* v. *Maury*, 5 Wend., 148; and in Texas, in *Norwood* v. *Cobb*, 24 Tex., 551, his views have been adopted.

If, then, evidence outside of the record can be resorted to, the evidence of the witness, Mott, (Trans., p. 27-37,) who was the attorney of the defendant in error, shows, beyond question, that the sale was made on proof of the existence and destruction of the old judgment—facts wholly foreign to the issue; the only fact essential at all to be proved being, not that these judgments once existed, but that they had been *allowed* and *approved* as claims against the estate.

In the charge of the court, the following paragraph occurs, (Trans., p. 55:) "Reference was here made to the case of *Converse* v. *Williams*, lately decided by the Supreme Court of that State, which was not regarded as laying down a different doctrine."

This case, which was not deemed applicable to the question at bar by the court below, arose as follows:

In 1863, one J. E. Williams, of Grimes county, Texas, purchased a tract of land, and executed his two notes to secure deferred payments, bearing date the 2d of September, 1863, (the date of the purchase,) for $4,000 each, with a lien or mortgage reserved on the land to secure the purchase money, one payable January 1, 1864, the other January 1, 1865.

Williams failed to meet the notes at their maturity, and on the first one falling due, Sorley, the holder, during the life-time of Williams, brought suit against the latter in the district court of Grimes county, at the fall term, 1866, for the amount of the note, and for foreclosure. The district court rendered its judgment in favor of Sorley on the 2d of November, 1866, and decreed the foreclosure. Before this decree was carried into effect, however, Williams died.

The other note, last falling due, passed into the hands of one Crawford, who, during the life-time of Williams, also brought suit on it in the district court of Grimes county, which suit was pending when Williams died, in October, 1867.

One Turver became the administrator of Williams' estate.

On the 1st of February, 1870, while the suit of Crawford against Williams' estate was still pending in the district court, Turver applied to the probate court of Grimes county, and obtained an order directing the conveyance by him to Sorley of the mortgaged property, in satisfaction of Sorley's judgment, obtained in the life-time of Williams.

The administrator, accordingly, made Sorley a deed in 1870. Sorley had failed to have his judgment sworn to, presented, allowed, approved, and ranked as a debt against the estate of Williams, as required by the probate act of 1848, under which act all these proceedings were had.

On the 29th of March, 1871, Converse & Co. having in the mean while obtained from Crawford an assignment of the second note held by him, made themselves parties plaintiffs in the suit of *Crawford* v. *Williams*, (Crawford having taken in the meanwhile the benefit of the bankrupt act,) and amended their pleadings, and made Sorley a party, setting up the invalidity of his deed of 1870 from the ad-administrator, because Sorley's debt had never been properly allowed and approved, so as to constitute it a claim, and that the probate court had no *authority* or *power* to order the administrator to make the deed, and asked that it be annulled.

The district court annulled the administrator's deed, and this question, among others, was presented to the Supreme Court of Texas in that case.

Has the probate court *power* to *order* a sale of real estate, or to foreclose a mortgage on it, in payment of a debt represented by a judgment of the district court, ascertaining the amount of the debt and decreeing a foreclosure, rendered in the life-time of the intestate, without such judgment being duly sworn to, allowed, approved, and ranked like other claims against an estate?

This question the Supreme Court of Texas answered in the negative, on account of a *want of jurisdiction and authority*

in the probate court to make the order, because such a claim cannot be made the basis of judicial action.

The language of the court is:

"It follows most clearly that neither the administrator nor the probate court has the *power* or *authority* to settle any such claims without *authentication*, as prescribed by statute. Any attempt to do so would be in *direct violation* of law, and must of necessity be void."

This case, which is the latest judicial construction that has been given to the act of 1848, lays down the doctrine that an order of sale based on a claim such as the one at bar, which has not been duly sworn to, allowed, approved, and ranked, is *prohibited* by law, and that hence the order is a nullity. And in this connection the court quote the following section of the probate act of 1848: (Paschal's Dig., art. 1308.)

"No administrator shall allow any claim for money against his intestate, nor shall any chief justice approve of any such allowance, unless such claim is accompanied by an affidavit in writing that the claim is just, and that all legal offsets, payments, and credits known to affiant have been allowed."

And say that this section is not "directory, but mandatory."

The court below disregarded this case, it is understood, upon the ground that, in *Converse* v. *Sorley*, the order was questioned in a direct proceeding, while in the case at bar the order is attacked collaterally. With all due respect, we submit that it is wholly immaterial whether the Supreme Court of Texas *construed* and defined the power and jurisdiction of the probate court in a case where they were directly or collaterally attacked. The question is, what did they hold that *power* to be?

If in the case of *Converse* v. *Sorley* they had held, as the court below held, that an order to sell real estate to pay a debt which had no legal existence was a mere irregularity or error of the court below, it could not be used as authority. But the Supreme Court of Texas did not place its decision

on any such ground, but based it on the broad foundation of a *want* of *power*, a *want* of *jurisdiction*, in the probate court to make such an order. So emphatic, so unmistakable, is the language of the court, that they assert,

"That such a direct and palpable *violation* of so plain and notorious a provision of the statute by the creditor, administrator, and court, under the circumstances of this case, would raise a sufficiently strong presumption of fraud to vitiate the whole transaction."

We believe, then, that the construction given by the highest tribunal in Texas to the statute under consideration is, that an order of sale based upon a claim that has neither been sworn to, allowed, approved, or ranked, is "not voidable, but *void*," to use their own language; that it has no more force than an order of sale made in the entire absence of any debts.

But it cannot be said that in *Converse* v. *Sorley* the order of sale was brought before the court in a direct proceeding to review the action of the probate court.

The direct mode of attacking the orders of the probate court is either by *appeal* or *certiorari*, (Paschal's Dig., art. 480,) which provides, that any person interested, desiring to have the proceedings of the probate court reviewed and corrected, may do so by writ of certiorari or appeal.

A proceeding under the statute having for its purpose, by writ of *certiorari*, to review and revise the action of the court, would be a direct attack on the judgment.

The proceedings in which the order of sale in *Converse* v. *Sorley* came under consideration, was a suit to foreclose a mortgage, and recover the value of a note, which was instituted long before the order and deed existed, and Sorley was only made a party, because he, *pendente lite*, became interested or asserted an interest in the mortgaged property, the subject-matter of that litigation. Sorley's deed from the administrator was based on the order of the court; it was his evidence of right, and it was presented in evidence by him, and was then passed upon by the court, just as was done in the case at bar, and held to be *void*, and an-

nulled, not set aside: not because attacked in a direct proceeding, but because the probate court had no *authority* under the law to order such a deed to be made. It would no more have availed him in an action of trespass to try title than it did in the action where it was set up. And this because of the inherent fatal defect in his deed, which made it *null* and *void*, and not merely voidable.

VI.

The sixth and last error assigned is, that the court erred in its charge to the jury on the issue of fraud, in obtaining the order of sale in the probate court of Galveston county.

The charge of the court complained of is as follows:

"I therefore instruct the jury that the administrator's deed was good and valid to convey, and did convey, to the plaintiff the title which S. M. Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff obtaining it.

"If the plaintiff obtained the deed for the purpose of defrauding the creditors of W. H. and J. H. Williams, and especially S. S. Connett, then the plaintiff cannot recover, and you will find a verdict for the defendants.

"This is the principal question for you to decide, viz, whether the order of sale made by the probate court was procured by the plaintiff, in combination with W. H. and J. H. Williams, for the purpose of defrauding Connett out of his debt.

"In deciding this question, you will assume that the judgment of the plaintiff against his brother, Samuel M. Williams, was a good and valid one. If they agreed to it, none but the creditors of S. M. Williams can question its validity. It cannot be assailed in this suit.

"You are also to assume that the judgment was duly presented to the administrators of S. M. Williams, and allowed by them, and approved by the proper judge of the probate court. These points must have been decided, and are concluded by the action of the probate court on the application for an order of sale.

"You are also to remember that the order of sale was made on the 30th of January, 1866, whilst Connett did not obtain his judgment against the Williams's on the note in this court until the 9th of February, 1867; so that when

the order of sale was applied for and made, the only legal demand which Connett held against the property in question, if the sale of slaves was a void transaction, was the trust deed given by W. H. Williams to J. R. Nichols, to secure a note which was assigned to Connett; and when he obtained that, I do not remember, if it was shown by the evidence.

"You are also to remember that the plaintiff, having a valid and legal claim against the estate of S. M. Williams, had a right to have any portion of the latter's estate applied to the payment of it, and whoever purchased any part thereof, purchased subject to that right.

"You are also to remember the rule of law that fraud must be proved, and cannot be presumed. If, however, it be proved to your satisfaction that either the plaintiff or his agent, (for he is bound by the acts of his agent,) in collusion and combination with W. H. & J. H. Williams, or with the administrator, procured the order of sale to be made in order to defraud Connett, you will find for the defendant; if it be not so proved, you will find for the plaintiff." (Trans., p. 144.)

There is no special objection to the legal propositions laid down in general terms in this portion of the charge of the court on the subject of fraud. The vice in the charge is, that it restricted the range of inquiry of the jury to so narrow a space as to leave practically nothing to investigate.

The fraud alleged to have been attempted was a sale of the land in suit, to defeat the previously acquired rights of S. S. Connett, under the order of the probate court, obtained by fraud, on an old, obsolete debt, which, after sleeping peacefully for sixteen years without so much as an execution having issued, without being approved and ranked as a debt, by collusion between the defendant in error, acting through his son and general agent, and the administrator, and that this sale was the means of defrauding S. S. Connett of his property.

In such an attitude of the case, for the court to inform the jury that neither the validity or character of the original debt, nor the question as to whether it was a subsisting and approved claim against the estate, had anything

to do with the question of fraud, is practically equivalent to forbidding inquiry at all, or at least restricting it in such a narrow compass as to defeat the object of such inquiry.

The *order* in question was being attacked for fraud, and the jury are told that the fact that the *order* was made decided the matter that there was a debt allowed, approved, and ranked.

This charge of the court is virtually to the effect that the order, if fraudulent, is not binding on the plaintiffs in error, and the question of fraud can be inquired into; but the order being the judgment of a court, *imports absolute* verity as to the facts under which it is rendered, and no extrinsic proof can be heard to dispute them.

In Duchess of Kingston's case, (1 Smith's Lead. Cases, 6 Am. ed., p. 653,) Chief Justice DeGrey held, that extrinsic evidence could be used to show fraud, remarking—

"In civil suits all strangers may falsify for covin, either fines, or real, or feigned recoveries, and this, whether the covin is *apparant* on the record or *extrinsic*."

The plaintiffs in error offered proof strongly tending to show that the old judgment of 1850 was vamped up for the benefit of the defendant in it himself, and not of H. H. Williams, in order to shield S. M. Williams against the judgment of St. John. (See Paschal's evidence, Trans., p. 117.)

Evidence was offered to show that the judgment slept until 1858, when it was revived, in the most amicable and quiet manner, just about the time that the State of Texas was pursuing S. M. Williams for illegal banking, and was about recovering heavy judgments against him. (Trans., p. 64.)

The answer of the administrator (Trans., p. 21) was before the court, in which he stated that the defendant in error "had assured him that the payment thereof would not be required; that it was a matter between brothers, which he did not care to collect;" and also his statement that the claim had never been regularly entered in his register, nor approved by the chief justice.

The evidence of Mott (Trans., pp. 29–31) showed that no such claim was before the court. All this was excluded by the charge of the court from the consideration of the jury.

This ruling is contrary to the rules of evidence applied alike in courts of law and of equity to questions of fraud. Fraud, in its very character, is secret, and difficult of positive proof. It is perpetrated in secret, and resorts to all modes of concealment, *mille trahit colores.* The courts, conscious of this defect, have always allowed the largest range of inquiry in order to elicit the truth.

In *Wright* v. *Lynn*, 16 Tex., 42, the Supreme Court of that State say:

"It seldom happens, in cases of fraud, that direct and positive proof can be obtained, and great latitude is allowed by the law in the reception of circumstantial evidence."

In *Butler* v. *Watkins*, (13 Wallace, 457,) it is said, "that in matters of fraud, large latitude is to be given to the admission of evidence."

See Freeman on Judgments, p. 297, to the same effect.

According to the view taken by the court below, the plaintiff in error had no right to show that the claim had no existence, or that it was paid or barred, or that there was no real debt, because the action of the court precluded inquiry. If such be the law, it certainly seems a very difficult, if not an impossible thing, to avoid the effect of a fraudulent act after it has assumed the form of a judgment.

The following authorities show that the court erred in refusing to allow the validity of the judgment to be inquired into:

Green v. *Green*, 2 Gray, 361.
Moseley v. *Moseley*, 15 New York, 334.
Townsend v. *Kerns*, 2 Watts, 183.
Osborn v. *Moss*, 7 Johnson, 161.

Had all the evidence been allowed to go to the jury, showing the conspiracy hatched by J. H. Williams, in 1866, using his father's name, a man seventy years of age,

(Trans., p. 137,) and who evidently was a mere curtain, from his own evidence. (Trans., p. 68.) The removal of W. H. Williams from the office of administrator, only one month before the application for the order of sale, it being found that he could not be used to carry out their fraudulent sale. See his letter to J. H. Williams, (Trans., p. 132.) The trumping up an old debt, when the administrator had, on the 26th of September, 1865, reported that he had funds to pay all the debts, (Trans., p. 44;) the inventory showing the heirs in posession of large property from the estate. (Trans., pp. 36, 37.) The evidence of J. H. Williams, (Trans., pp. 134, 140,) who proclaims his fraud. If, in connection with this evidence, the court had allowed the plaintiffs in error to show that the machinery of the probate court was put in motion by the use of a false claim, which could not even be the basis of any judicial action, the jury would have at once branded the order and the deed as alike fraudulent. But the court left the jury practically nothing to inquire about on this important branch of the case.

A *venire de novo* should be awarded.

GEO. F. MOORE AND
JOHN HANCOCK,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1873.

JOHN D. NASH *et als*,
Plaintiffs in Error,
vs.
REBECCA A. WILLIAMS,
Executrix of
HENRY H. WILLIAMS, deceased,
Defendant in Error.

No. 229.

In error to the Circuit Court of the United States for the Western District of Texas.

BRIEF FOR THE DEFENDANT IN ERROR—GENERAL STATEMENT OF THE CASE.

This was an action of trespass to try title filed on the 29th of April, 1868, by Henry H. Williams, the testator of the defendant in error, against the plaintiffs in error, John D. Nash and others, for the recovery of a league of land, near the town of Bastrop, on the Colorado river, known as League Number Four, and originally granted to S. M. Williams. See Record, pp. 1, 2.

And at the January Term, 1869, the plaintiffs in error filed a Plea in abatement. (See Record, pp. 5, 6) And on the 7th of June, 1870, the said Henry H. Williams filed his amended

Petition. (See Record, pp. 8, 9.) And on the 7th of June, 1870, filed his Replication to the Plea of Limitations filed by the plaintiffs in error. (See Record pp. 10, 11, 12.)

The plaintiffs in error then filed a plea of "Not Guilty;" and the cause was tried on the 4th of June, 1872, resulting in a verdict and judgment for the said Henry H. Williams, the testator of the defendant in error. (See Record, pp. 12, 13.) On the trial of the cause in the Court below the plaintiffs in error asked the Court to give the following instructions to the jury, viz: (See Record, pp. 14, 15.)

1. On the death of S. M. Williams, the legal title to the land in suit vested in the heirs of said Williams. Allowed.

2. The defendant's claim of title in evidence before you vests the fee in S. S. Cornett to the land in suit. Allowed.

3. The heirs of S. M. Williams took this legal title charged with the debts of the estate, and if you believe that the land in suit was sold fairly and in good faith to pay a bona fide debt which has been allowed and approved against the estate of S. M. Williams, and that the order of sale was obtained without any fraud on the part of the plaintiff or his agents, (for the acts of his agents done by his consent or ratified by him when known are his acts,) then such sale passed the title to the plaintiff.

But if you believe that the order of sale was obtained by a fraudulent collusion between the heirs of Williams and S. H. Williams, agent for the plaintiff, and that the debt was never allowed or approved against the estate, then you will find for the defendants. (See Record, p. 15.) Modified according to charge delived.

4. If, however, the jury believe, from the evidence, that the plaintiff, H. H. Williams, had actual notice of the sequestration suit of Cornett *vs.* S. H. Williams and W. H. Williams, and

employed counsel, and had an opportunity to appear and defend and failed to do so, then the judgment in that cause is as binding on him as if he had been a party to the record.

Disallowed and explained as appears by the charge delivered. (Record, p. 15.)

5. If the jury believe that, at the time the plaintiff alleges the trespass to have occurred, and at the time the suit was filed, the land was in the custody of the law, and that the defendants entered under the authority of the Court and were holding subject to the judgment of the Court when this suit was brought, then you will find for the defendants

Disallowed because the facts do not authorize such a charge. Cornett had replevied the lands in February. This suit was not brought till the 29th of April, 1868. (See Record, p.16.)

6. The plaintiff in support of the issue on his part, and to show title for the land sued for, has offered in avidence a deed of the administrator of Samuel M. Williams. executed by virtue and under an order of sale of the Probate Court of Galveston county. If said Probate Court had not jurisdiction to make said order of sale, then said sale is void, and the plaintiff by his purchase acquired no title.

The jury are further instructed that said Court had no jurisdiction to order said sale, unless the claim of the plaintiff, at whose instance and on whose application it was made, had been presented to and allowed by the Chief Justice; and in determining whether the Court had jurisdiction, not only may the Record be looked to, but also all the testimony outside of said Record which has gone to the jury tending to prove the existence or non-existence of a claim of debt allowed and approved as required by law, to give it some standing as a valid claim against said estate.

Disallowed. The charge covers the ground of this instruction and expressed the views entertained by the Court. (See Record, p. 16.)

The opinion of the Hon. Joseph P. Bradley, before whom this case was tried below, will be found at pp. 16, 20, Record, both inclusive.

The paper title relied upon by the said Henry H. Williams on the trial of the cause in the Court below was an administrator's deed to him from Philip C. Tucker, the administrator of the estate of Samuel M. Williams, dated April 15, 1866. (See Record, pp. 24, 25. And an administrator's deed to him from the same party, dated the 2d of January, 1868. See Record, pp. 25, 26.)

These deeds were made by virtue of an order of the Probate Court of Galveston county, entered in the due course of the administration of the succession of Samuel M. Williams, deceased, which order was entered at the January Term, 1866, of said Probate Court. See Record, p. 22.

This order was based upon a debt due to the said Henry H. Williams by the estate of the said S. M. Williams, and judgments obtained thereupon in the United States District Court at Galveston, the one on the 28th of June, 1850, for $26,736, and the other obtained on July 12th, 1858, for $43,939.34. See Record, p. 62.

Evidence was also offered as to the efforts made to establish the judgment debt as a claim against the intestate S. M. Williams, and the loss or destruction by fire of the records of the two judgments. See Record, pp. 63–66.

And in connection with this paper title the said Henry H. Williams offered in evidence two depositions of himself, taken *de bene esse*, at different times. See Record, pp. 67–69.

The title of the plaintiffs in error, and the defences upon which they relied, is fully set out in the brief of their counsel filed in this cause. See pp. 2–6 of said brief, and the pages of Records quoted and referred to therein.

The assignment of errors, of the plaintiffs in error, are six in number, and will be found at pp. 6–7 of the brief of counsel of the plaintiffs in error.

And at the hearing of this cause the counsel for the defendant in error will respectfully contend that there was no error in the rulings of the Court below; and therefore its decision should be affirmed by this Court.

It will, perhaps, be better to follow the assignment of errors in the brief of the plaintiffs in error and discuss each separately in the order therein stated, so as to ascertain whether it is sustained by the evidence in the Record and the authorities cited in support of it.

The first error assigned is that the Court below erred in allowing the two depositions of Henry H. Williams, taken *de bene esse*, to be read to the jury. (See brief of plaintiffs in error, pp. 6 and 7, and Record, p. 67 and p. 70.)

It is respectfully submitted that by the true construction of the Act of Congress of July 2, 1864, (see 13th Statutes at Large, section 3, page 351, 2d Brightly's Digest, 133,) parties to suits were placed on the same footing as other witnesses; and whenever it would be proper to take the deposition of a witness not a party to the suit, the deposition of a party to the suit might be taken in the same manner. By reference to the Record, p. 67 and p. 70, it will appear that all the formalities relative to taking, closing, endorsing, forwarding and opening depositions were observed with reference to the depositions of Henry H. Williams. Hence, the Court below in allowing these depositions to be read to the jury did not violate any of the rules laid down in the cases of *Walsh* vs. *Rogers*, 13 Howard's S. C. Reports, 286, and *Garner* vs. *Cutter*, 28th Texas Reports, 182.

The citation from Blackstone's Commentaries, 383, can have no bearing upon this cause, because when that learned author wrote the evidence of no party to a suit could be taken either orally in Court or by means of depositions.

But if we admit, for the sake of the argument, that the Court below erred in allowing the said depositions of Henry H. Williams to be read to the jury, were the plaintiffs in error injured or prejudiced thereby? Clearly not, for the testimony was only cumulative, and without it there was abundant evidence in the cause to show that S. M. Williams was indebted to Henry H. Williams, and the dates and amounts of the judgments which the latter had recovered against the said S. M. Williams. (See Record, pp. 53–67, particularly pp. 62, 63, 64, 65.)

If, then, the admission in evidence of the said depositions of Henry H. Williams did not, and could not, render any injury to the plaintiffs in error, their admission in evidence cannot be assigned as error, and will not support an assignment of error. *Phillips' Practice in the Supreme Court of the U S.* 183 ; *Greenleaf vs. Birth*, 5*th Peters' S. C. Reports*, 132 ; *Philips vs. Preston*, 5*th Howard's S. C. Reports*, 278.

The second error assigned by the plaintiffs in error is (See brief, pp. 6 and 9,) that the Court below erred in its charge to the jury as to the effect of the deed of the 18th of June, 1867, made by Firmin and Rector to S. S. Cornett (See Record, pp. 93–97.) The Deed of Trust, by virtue of which this deed was executed, was dated the 1st of January, 1864. (See Record, pp. 93 and 103 et seq. and briefs of plaintiffs in error, pp. 9, 10, 11. And the instruction which the Court gave to the jury relative to said deed is on p. 17 of Record, and is quoted on p. 10 of the brief of the plaintiffs in error.)

And it is respectfully submitted not only that there was evidence in the cause which fully warranted the instruction which the Court below gave the jury relative to the deed of trust, but that moreover the act of S. S. Cornett in going from Missouri to Texas, and taking his property with him, at the time and in the manner which he did, was in violation not only of the well known and recognized laws of war, but also in violation of the laws of the United States, and the Proclamation of the President, issued in pursuance thereof. (See Preamble of the Act of 1861, chapter 3d ; 12th Statutes at Large, pages 251 and 1262; Appendix to Laws of 38th Congress ; Acts of 1863 and 1864; 2d Brightly's Digest, page 193 ; Acts of 37th Congress of 13th July, page 257 ; first Proclamation of 16th of August, 1861. See Appendix to Acts of 37th Congress, page 5.)

And it is further submitted that an examination of the authorities cited and relied upon by the plaintiffs in error (see Brief, pp. 11, 12,) will show that while this Court held that the buying and selling of property or slaves by and between people of the same community was lawful, (prior to the adoption of the 13th Amendment to the Constitution of the United States,) this

Court has never held that during the late war it was lawful for a citizen of the United States to migrate into hostile territory, taking with him his property and slaves, and so to give aid and comfort to the enemies of his country.

The third assignment of error (See brief of plaintiffs in error pp. 12–29) relates to the effect given by the Court below, in its charge to the jury, to the proceedings and judgment in the sequestration suit of S. S. Cornett vs. J. H. and W. H. Williams et al , being a former suit for the recovery of the same tract of land ; and the plaintiffs in error insist that Henry H. Williams was bound by said judgment.

But it is respectfully insisted that this conclusion is eroneous, and the instruction which the Court below gave to the jury (see Record, pp. 17–18,) was a correct statement of the law upon this branch of the case.

At common law a party could bring as many actions in ejectments as he pleased, and a judgment against his tenant was not binding upon him, under the general rule that he was no party to the suit and as a matter of course had not had his day in Court. Under the laws of Texas there is a permissive statute which permits the landlord to make himself a party and defend the suit. (See article 5,296 Parchal's Digest, page 893.) But that statute is permissive only, and as the Record shows (see Record, pp. 76–77,) that Henry H. Williams did not appear or enter himself as defendant in said sequestration cause, the charge of Judge Bradly to the jury was correct, because said Williams never had his day in Court. *See Rogers vs. Wheeler*, 25*th Wendell*. 431 *and* 434; *Ryers vs. Ripley*, 25*th Wendell*, 436; *Coburn vs. Palmer*, 8*th Cushing*, 124; *Paul vs. Wiltman*, 3*d Watts and Serg.* 407; *Collingwood vs. Irwin*, 3*d Watts*, 306; *Chirac vs. Reinicker*, 11*th Wheaton*, 280; *Morris vs. Harmer*, 7*th Peters*, 553; *Hollingsworth vs. Bailner*, 4*th Peters*, 465; *Hughes vs. Blake*, 6*th Wheaton*, 453.

For the reasons above given, and relying upon the authorities cited, it is submitted that the first reason given by the plaintiffs in error in support of their third assignment of errors cannot be sustained.

And it seems the second reason is equally untenable, because there was no evidence in the cause, upon which the Court could have given the instruction asked by the plaintiffs in error. (See brief of plaintiffs in error, pp. 25-26, and Record p. 82.)

It is only necessary to refer to the Record to show that the 4th assignment of errors by the plaintiffs in error is untenable. See Record, pp. 65, 67, particularly pp. 62, 63, 64, 65, 66.

The 5th assignment of errors by the plaintiffs in error (see their brief, p. 37,) cannot be sustained, because it is directly in conflict with the well established rules of law and a number of adjudications by courts of high authority.

Under this assignment of errors the plaintiffs in error insist that it was incumbent upon the said Henry H. Williams to show that all the acts had been done, and formalities complied with, which were necessary to give the Probate Court authority to order the sale of the land. This assumption can be easily answered.

1st. At the date of the order and sale the Probate Law of 1848 was in full force, and to show that enough was alleged to give the Probate Court jurisdition it is only necessary to cite article 1315, page 319 of Paschal's Digest.

2d. But even had it been necessary for Henry H. Williams to furnish all the proof upon which the plaintiffs in error insist, they, themselves, relieved him from the necessity of doing so by introducing in evidence a full and complete transcript of the proceedings in the Probate Court of Galveston, (see Record, pp. 31, 53,) and then asked the Court to instruct the jury that they could not go behind the judgment of the Probate Court as to the existence or n n-existence of the debt in favor of Henry H. Williams against the estate of S. M. Williams. See Record, p. 53.

3d. The objection urged under this assignment of errors (see brief, p. 39,) against the validity of the deeds from P. C. Tucker, administrator of S. M. Williams, to Henry H. Wil-

liams, cannot be sustained. It will appear by reference to the following authorities that the said Henry H. Williams took a perfect legal title under said deeds: *Watkins vs. Holman*, 16 Peters, 25; *Williamson vs. Leland*, 2 Peters, 625; *Ricard vs. Williams*, 7 Wheaton, 59; *Drinkwater vs. Drinkwater*, 4 Mass. 357; *Comstock vs. Crawford*, 3 Wallace, 396; *Sypert vs. McGouen*, 28 Texas, 639; 26 U. S. Digest, page 240; *Boyd vs. Blankman*, 29 California, 19; *Knowlton vs. Smith*, 36 Mo. 507; *Irenson vs. Loberg*, 26 Ills., 179; *Poor vs. Boyce*, 12 Texas, 440; *Nesbitt vs. Richardson*, 14 Texas, 656; *Bartlett vs. Cooke*, 15 Texas, 471; *Dancy vs. Strinblinge and Wife*, 15 Texas, 557; *Mitchell vs. De Witt*, 20 *Texas*, 294; *Worwell vs. Williams*, 19 *Texas*, 180.

The sixth and last assignment of errors is "that the Court erred in its charge to the jury on the issue of fraud in obtaining the order of sale in the Probate Court of Galveston county. (See brief of plaintiffs in error p. p. 73, 74, where the charge complained of is set out as taken from Record, p. 144.)

It is submitted that there is no error in the charge complained of, but on the contrary it stated the law to the jury upon this branch of the case fully and correctly.

In support of this assertion the following points are relied upon:

1st. As the question of fraud made against Henry H. Williams and the other parties in procuring the sale of the league of land in controversy through fraud was fairly submitted to the jury by the Court, their finding will not be disturbed by this Court, because the jury are the exclusive judges of the facts. See *Latham vs. Selkirk*, 11 Texas, 321; *Wright's Administrator vs. Dowell*, 34 Texas, 305; *Ward vs. Bledsoe*, 32 Texas, 253; *Patton vs. Gregory*, 21 Texas, 519; *Legg vs. McNeill et al.*, 2 Texas, 432; *Duggan vs. Cole*, 2 Texas, 388; *Green vs. Hill*, 4 Texas, 468.

2d. There can be no question that the charge of the Court to the jury as to the weight to be given to the decision and action

of the probate Court was correct, for that Court was not only a Court of competent but general jurisdiction on the estates of deceased persons. See 1st Brightly's Federal Digest, pp. 494, 495, secs. 79 and 83.

3d. The Court was clearly right in charging the jury that under the laws of Texas the said Henry H. Williams, the plaintiff below, having a valid and legal claim against the estate of S. M. Williams, had a right to have any portion of the latter's estate applied to the payment of it; and whoever purchased any part of said estate purchased subject to that right. See Paschal's Digest, page 337, article 1373, where it is stated that at the death of a party his estate vests in the heirs or devisees, subject to the payment of all his debts in due course of administration.

And again, while administration is pending, the heirs can only acquire a right to the possession or title of any part of the estate by pursuing the mode prescribed in Paschal's Digest, p. 331, articles 1357, 1358, 1359, 1360, 1361, 1362, or under article 1372 of Paschal's Digest, 336.

As the heirs of S. M. Williams did not pursue any one of the foregoing modes, their attempted division of the estate, while administration was pending, was void as to his *bona fide* creditors, and the said Henry H. Williams acquired a good and perfect title to the league of land in controversy.

In conclusion, the counsel for the defendant in error respectfully insists there is nothing in the Record or the assignment of error of the plaintiffs in error which shows any error in the rulings of the Court below; and therefore the judgment of that Court should be affirmed.

JAMES A. BUCHANAN,
Of Counsel for the Defendants in Error.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1873.

JOHN D. NASH *et als.*,
Plaintiffs in Error,
vs.
REBECCA A. WILLIAMS,
Executrix of
HENRY H. WILLIAMS, deceased,
Defendant in Error.

No. 229.

In error to the Circuit Court of the United States for the Western District of Texas.

BRIEF FOR THE DEFENDANT IN ERROR—STATEMENT AND POINTS, BY JACKSON & JACKSON, of Counsel.

I. Having no access to the assignment of errors, we adopt, in this brief, the order indicated by the bills of exception.

It will be seen that the testator of the defendant in error (being plaintiff below) derived his title by his purchase of the land in controversy at a sale of the same, on the 6th of March, 1866, by the administrator of the estate of S. M. Williams, deceased, who was the grantee of the government, and under whom the defendant below (plaintiffs in error) also claim title. This sale was made under the orders of the County Court (sitting in probate)

of Galveston county, wherein the estate of S. M. Williams was then being administered.

The validity of these orders, and consequently the validity of the sale, and of the administrator's deeds conformably therewith, constitute the matters comprised in the first bill of exceptions. (Record, 20 to 55.) Certain portions of the Court's instructions to the jury are excepted to in the same bill, but these portions present the same questions as those raised on the evidence, and there is no occasion to discuss them separately.

The first objection is, "that the application for the sale was not made by the administrator, nor did it appear that the administrator had refused to make the sale." (Record p. 29.)

But by reference to the Act of March 20th, 1848. (Paschal's Digest, Article 1,315,) it will be seen that the "*neglect*" of an administrator authorized any creditor of the estate to apply for the order, and that it is wholly immaterial whether the administrator has "refused" or not.

The second and third objections are confuted by the record. See the answer of the administrator and the order of sale, (Record 21-22;) they disclose the condition of the estate, and the necessity of the sale, and show distinctly that *the administrator designated* the land now in controversy as *the property* which should be sold. They show also, in the most solemn judicial form, the "approval" of the creditor's claim by the Chief Justice of the County Court; for that functionary constituted the Court when sitting in probate and in all matters pertaining to estates of decedents. Even if he had never previously "approved" the claim, his order of sale is the most solemn and ample approval he could possibly have accorded it.

The fourth objection was frivolous. It is based on the fact that the creditor, Williams, in his application for the order of sale, described his judgment as being "to the amount of forty thousand dollars," instead of particularly explaining that it was the judgment debt of June 28th, 1850, of $26,736, which, with its interest at 8 per cent. amounted to forty thousand dollars or more. The creditor was under no necessity to give a minute description of the claim. The administrator recognized, in his answer, the claim to which the creditor referred, and the

order of Court identified the claim with certainty and precision.

The fifth objection is still more inconsequential. It is based on the mistake of the administrator, in his first deed, by misstating the term of the Court at which the order of sale was rendered. He called it the *February*, when in fact it was the *January* term. Of what consequence was this? The *material* facts were that he had acted under a valid order, and that the sale had been confirmed. When these concur, as in the present case, our statute is *express* that the Administrator's conveyance "shall vest the right and title that the testator or intestate had, in the purchaser, and shall be *prima facie* evidence that all the requisites of the law have been complied with in making the sale." (Paschal's Digest, Article 1327). In *Bartlett* vs. *Cocke*, 15 Texas, 471, the Administrator's deed made a mistake of *two years* and more in reciting the dates of the order of sale and of the sale itself, and this was insisted on as invalidating his deed; but the Supreme Court of Texas (pp. 477-8-9) made a very complete and summary disposition of such pretences, saying that the recitals of the deed, "however convenient they may be for purposes of reference, they form no essential part of the conveyance; and had they been left out altogether, the validity of the deed would not have been impaired."

The foregoing were the objections made to the first deed of the Administrator. To his second deed, dated January 2nd, 1868, additional objections were urged; and first, that "no order of Court was produced, showing any authority in the Administrator to execute such an instrument." Where the necessity or occasion for such an order? If the Administrator had refused to make this second deed, and if a further assurance or conveyance was necessary to the purchaser at his sale, would he not have been compellable to make it by and court of equitable jurisdiction? And might he not lawfully do that which he could have been compelled to do? To such an extent, indeed, has this principle been carried by the Supreme Court of Texas, that it has said that "if necessary for the rights of the purchaser, it would seem that an Administrator, *although his office may have expired*, might execute a formal conveyance for lands sold and the purchase money paid during his administra-

tion." (15th Texas, 477). Surely, then, so long as he still remained Administrator, he might and could give a further conveyance for the purpose ef correcting misrecitals in the first one. In this case, however, these principles need scarcely be invoked, for it is morally certain that the Circuit Judge was correct in holding that the errors in the first deed were merely clerical and did not invalidate the deed.

The remaining objections urged to the second deed are disposed of by what is already said. Following them, the first bill of exceptions proceeds to set out evidence introduced by both parties, on which to base objections to certain portions of the instructions given and of those refused. With regard to the latter, the Circuit Judge has appended to them his reasons, and they are so conclusive as to render comment unnecessary.

The same remarks might truthfully be made with reference to the instructions given, but it may be well to cite some of the Texas authorities on which the charge was directly founded. The first clause of the instructions excepted to States in brief, but comprahensive terms the legal *status* of an intestate's estate with respect to the heirs upon the one hand and the creditors upon the other. This clause is founded on the express provisions of the statute, Paschal's Digest, article 1373; and their practical result (as applicable to this case) is that an administrator's sale, made by order of the Probate Court, divests the legal title which descended to the heirs, and conveys to the purchaser all the estate which the intestate had. To this full extent go the adjudications of the Supreme Court of Texas. (See *Poor* vs. *Boyce*, 12 Texas, 449; *Mitchell* vs. *De Witt*, 20th Texas, 299; *Nesbitt* vs. *Richardson*, 14 Texas, 660. *Sypert* vs. *McCowan*, 28 Texas, 638; *Soye* vs. *McAllister*, 18 Texas, 97.) And this is in accordance with the law and general principles maintained in the other States. (See *Watkins* vs. *Holman*, 16 Peters, 61-2-3; *Wilkinson* vs. *Leland*, 2 Peters, 657-8.)

In a subsequent clause the Circuit Judge instructed the jury that the validity of the order of sale cannot be questioned in the present suit, which is a collateral proceeding in relation to the judicial acts of the Probate Court. This, unquestionably, is the law of Texas. Some of the cases already cited are ex-

plicitly in support of it. In *Poor* vs. *Boyce*, 12 Texas, 451, the Supreme Court of Texas quotes from the opinion of the Supreme Court of the United States, in *Grignon* vs. *Astor*, 2 Howard, 243, where it is said that "titles acquired under the proceedings of Courts of competent jurisdiction must *be deemed inviolable* in *collateral actions*, or none can know what is his own; and there are *no judicial sales* around which greater sanctity ought to be placed than made of *the estates* of *descendants*, by order of those Courts to whom the laws of the States confide full jurisdiction over the subjects." In the well-considered case of *Withers* vs. *Patterson*, 27 Texas, on page 497 *et seq.*, the same principle is lucidly and emphatically maintained; and to the same effect is every case in the Texas Reports which have reference to the question. (See *Tolliver* vs. *Hubbell*, 6 Texas, 166; *Lynch* vs. *Baxter*, 4 Texas, 445; *Sutherland* vs. *De Leou*, 1 Texas, 309; *Howard* vs. *Bennett*, 13 Texas, 315–5.) See also 3 *Wallace*, 403.

From the two propositions just discussed the remaining instructions respecting the administrator's sale, followed as logical and inevitable conclusions, and the Circuit Judge correctly ruled that "the administrator's deed was good and valid to convey, and did convey, to the plaintiff the title which S. M. Williams had in the land, unless it was rendered void by fraud on the part of the plaintiff in obtaining it."

The imputation of fraud was repelled by the verdict, and that is conclusive upon that question. There is, therefore, no occasion to notice further the first bill of exceptions.

II. The second bill of exceptions (Record 56 to 67) is entitled to no serious consideration. It covers certain evidence introduced by the plaintiff below, to prove the existence of his judgment debt upon which the order of sale was founded, the record evidence having been destroyed by fire. It was not *necessary* that the plaintiff should have established this, otherwise than he had already done by the recoeds of the Probate Court and its order of sale; and doubtless the evidence was introduced merely to repel the imputation of fraud which the defendants sought to fix upon his case. The Texas cases already cited show that in

this collateral action the orders of the Probate Court were conclusive of the debt, and all other mattsrs necessarily considered by that Court in adjudging them; and, therefore, in a legal sense, the plaintiff's case would stand upon as impregnable a ground if the evidence objected to was eliminated from the record. The objections to it are vague and inconsequential, and were correctly overruled.

III. The third bill of exceptions (Record, 67 to 71,) is to the admission of two depositions of the same witness, he being plaintiff in the case. The objections were frivolous. The Act of Congress of July 2d, 1864, places a *party* on the same footing as a witness, as other witnesses, and of course his testimony may be taken by deposition or in any legal manner. The objection that no order of Court was obtained to take the second deposition, was a matter purely for the discretion of the Court; and error cannot be assigned on the exercise of that discretion.

IV. The fourth bill of exceptions (Record, 71 to 82,) is to the refusal of instructions asked by the defendants, to the effect that the plaintiff was concluded by the judgment and proceedings in a previous suit to which he was never a party; and also to instructions given to the contrary of that proposition. The instructions given themselves disclose with remarkable cogency the reasons on which the ruling was based, and we need only supply authorities. The statute reads as follows: "When a tenant is sued for lands of which he is in possession, the real owner, or his agent or attorney, MAY enter himself on the proceedings as the defendant in the suit, and SHALL be entitled to make such defence as if he had been the original defendant in the action." (Paschal's Digest, article 5296.) It is clear from this language that a right or privilege is thus secured to the owner which he may or may not assert, at his own option. The nature of this privilege concurs with the entire context in showing that the word "may" is used in its natural or permissive sense; and when, in the next line, a mandatory or imperative

sense is required, the law-making power uses the word "shall." Clearly, therefore, the statute gives no color to the pretence that a recovery against a tenant precludes or affects the title of his landlord.

How, then, was this matter under the Common Law, which has been in force in Texas since 1840? (Paschal's Digest, article 978.)

Under the Common Law, it is believed that no authority can be found, holding a landlord affected by a judgment in ejectment against his tenant, except the landlord was not only notified that his title was denied, but also that he was *required to defend it.* To this effect is *Paul* vs. *Witman*, 3 Watts & Sergeant, 409, and other cases.

But not only was the plaintiff in the case at bar *never required*, pending the previous suit against his tenants, to come in and defend his title, but the fact affirmatively appears by the present record, that his title *was not brought in question* in that previous suit, and that he was never notified that it would be brought in question. These facts bring this case fully and precisely within the decision in *Ryerss* vs. *Rippey*, 25 Wendell, 432, where it was ruled that "a judgment in ejectment against *tenants* was not conclusive upon the *landlord*, although the latter retained an attorney to defend the suit brought against his tenants, especially as on the trial, the *title*, as between the *plaintiff* in the suit and the *landlord* did not come in question." And this, it is believed, is the common law on the question.

V. The fifth bill of exceptions is to another portion of the instructions to the jury. (Record, 82 to 117). It merits no discussion. The instructions were obviously correct; but even if they were not, and, on the contrary, the deed of trust was supported by a good consideration, the plaintiff's paramount title was in no way impaired by the trust deed, which, as to him, was *res inter alios acta.*

VI. The sixth bill of exceptions has no pertinency to anything but the question of fraud, and that question was left

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fully to the jury, and it is settled by their verdict. So far as this bill questions the instructions of the Court, it is fully answered by what has been said upon the first bill—and, indeed, is disposed of by the unmistakeable tenor of the instructions themselves.

As there was no error in the rulings of the Court below, its judgment should be affirmed by this Court.

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of Counsel

Holbert.
Morris v. ~~Colman~~
36 Texas - p 19 -

~~McKay v. Porter~~
~~27 Tex - 495~~

3 Wallace App
16, Wallace - 32 -

2 Mac - 210 -
10 " 308 - 583 -
11 " 268 - 581 -
16 " 331 -

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